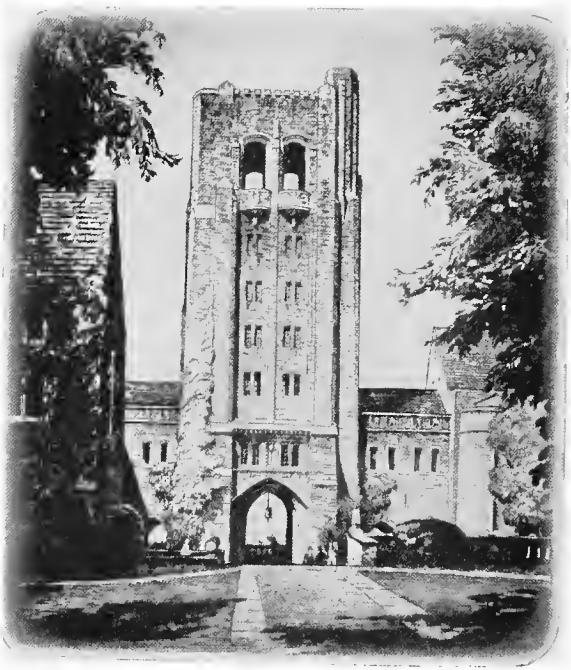

By an examination of over 200 leading cases and a close study of the laws of many foreign countries, Dr. COOK here makes possible a restatement of our law of Insanity and Mental Deficiency in relation to Civil Responsibility—which is at present on a very unsatisfactory footing. The book will prove of special value to medical men on the staffs of mental hospitals, to psychiatrists, and to those graduates who are studying for the newly established diploma in Psychological Medicine.

INSANITY AND MENTAL DEFICIENCY

In Relation to Legal Responsibility

INSANITY AND MENTAL DEFICIENCY

IN RELATION TO

LEGAL RESPONSIBILITY

A Study in Psychological Jurisprudence

BY

WILLIAM G. H. COOK, LL.D. (Lond.)

Of the Middle Temple, Barrister-at-Law;
King Edward VII
Research Scholar of the Middle Temple.

Thesis approved for the Degree of Doctor of Laws in the University of London.

LONDON:
GEORGE ROUTLEDGE & SONS, LIMITED.
NEW YORK: E. P. DUTTON & CO.
1921

Dedicated to

HENRY FURSE KEENE, O.B.E.,

Chief Officer of the Asylums and Mental Deficiency Department of the London County Council.

FOREWORD

By

SIR JOHN MACDONELL, K.C.B., M.A., LL.D., F.B.A., late Senior Master High Court of Justice, Emeritus Professor of Comparative Law in the University of London.

Dr. Cook has the good fortune to treat of a subject rarely dealt with as a whole. There are very many decisions as to certain aspects of the civil responsibility of lunatics; their multitude and variety are perplexing. There is no want of text-books dealing with parts of this subject. But, while criminal liability has been studied as a whole, and an attempt, more or less successful, has been made by lawyers to construct a theory applicable to all offences, there has been no satisfactory attempt, so far as English law is concerned, to frame a theory of liability for torts and contracts and testamentary capacity. Dr. Cook's work, the result he tells us of an examination of upwards of two hundred leading cases and of the study of the laws of many foreign countries, is a novel and comprehensive survey much needed, and may prepare the way for a re-statement of our law in accordance with the teaching of modern psychology. It is still true, as Brett, L. J., remarked in 1879, that the law relating to civil responsibility of lunatics stands upon a very unsatisfactory footing.

It is not easy, and, indeed it may not be possible, to devise a precise common criterion of responsibility for delicts or torts and capacity for making contracts or wills. In the case of torts the essentials may be much the same as in the case of crimes; *culpa* or *dolus* must be a necessary element. The chief difficulty is as to torts (if any) for which there is an

absolute liability. Dr. Cook holds—and as to English law he may be right—that even in the class of cases of which *Fletcher v. Rylands* is the classical illustration, a lunatic incapable of *culpa* or *dolus* would not be liable. But under some systems of law it would be otherwise. As to contracts, Dr. Cook gives an interesting and luminous history of the remarkable changes in judicial opinion, terminating in the decisions in *Molton v. Camroux* and *The Imperial Loan Company v. Stone*, which he acutely criticises and declares to be wrong in principle. No less instructive is his account of the law as to testamentary capacity, as finally formulated in *Banks v. Goodfellow;* a law wisely elastic, affording large discretion to judges and juries in dealing with the endless variety of cases of mental deficiency which come before a Probate Court. It has fallen to me to read much, both in English and foreign legal literature, on the subject which Dr. Cook treats, and I am greatly struck by the precision of his observations and his comprehensive outlook.

His book will, I am convinced, educate professional opinion, and help to reconcile the lawyer, the physician and the psychologist.

PREFACE

By

SIR ROBERT ARMSTRONG-JONES, M.D., F.R.C.P., D.Sc., C.B.E., J.P., D.L., F.S.A., Lecturer in Psychological Medicine and Physician to out-patients St. Bartholomew's Hospital, formerly Lt.-Col. R.A.M.C. and Consulting Physician to the War Office.

Dr. Cook has written a most admirable treatise upon the difficult question of Civil " responsibility." The term responsibility is a purely legal one and means liability to punishment, so that criminal responsibility means liability to punishment for crime, whilst civil responsibility refers to liability for torts and contracts. The legal test of criminal liability is, according to English Law, the knowledge of right and wrong, but this is not the test of insanity and a person must be proved to be insane before such a test can be resorted to in order to determine whether he is liable to punishment. Such is the law in this country at present, though not in some foreign systems of law. This has led medical men to affirm that the legal test of right and wrong is based upon an erroneous psychology, viz., on the paramount influence of the reason rather than the emotions and feelings and the will upon conduct.

At present the only issue in regard to Criminal responsibility is, from the lawyer's standpoint, the knowledge of right and wrong at the time the act was committed, a view that many medical men assume to be an unjustifiable subservience to antiquated legal metaphysics, whilst there is no common factor whereon decisions may rest in regard to the capacity for contract of persons who are of unsound mind.

Dr. Cook in his text-book covers new ground for he discusses logically and historically the parallel question of Civil responsibility, and in this work he deals with conditions which have been described as resting upon "a very unsatisfactory footing." He refers to the conflicting views of the medical and legal professions upon the question of responsibility and he bases his investigations not only upon the principles of the Common Law and of Equity but also upon the decisions of reported cases.

In the work which Dr. Cook has contributed he traces the evolution of responsibility from remote times. He has read widely and he writes accurately, giving chapter and verse for the opinions of others, and he arranges his matter methodically. His treatise was accepted by the University of London for the LL.D degree and is a valuable contribution to forensic medicine. In view of the proposal by the Ministry of Health that insane persons should not be certified during the stage of early symptoms, this work will be of great value to those who have to undertake their care and control in the incipient stages of the disease, as well as after the stage of certification. It will also prove helpful as well as interesting and informing to all medical men on the staffs of mental hospitals, as also to the advanced reader in psychiatry and to those graduates who are studying for the newly established Diploma in Psychological Medicine.

TABLE OF STATUTES CITED

INDEX TO CASES CITED

CONTENTS

INTRODUCTION

From official statistics recently published, it appears that nearly one per cent. of the population of England and Wales suffers either from insanity or from feeble-mindedness. In the Administrative County of London alone out of a population of four and a half millions it is officially estimated that over 40,000 persons are either insane or feebleminded. During the fifty years immediately preceding the outbreak of the European War the number of insane and feebleminded persons in England had increased by 250 per cent, while the general population had increased during the same period by only 82 per cent.

Insanity—under which term is included all disorders of the intellect of a grave character—has been little discussed by lawyers with reference to its *general* effect on responsibility; on the contrary it has been discussed almost exclusively with reference to the particular effect of it on *criminal* responsibility only. The object of this book, therefore, is to fill the gap caused by the absence of modern works dealing with the *civil* responsibility of lunatics and of the mentally defective.

The ideas current on the subject of insanity have undergone appreciable modification of late years. In fact, it is only in recent times that the subject has received anything approaching the consideration which it deserves. Attention was drawn to it over fifty years ago by the horrible sufferings endured by insane persons while in confinement in madhouses. It used to be believed that every insane person was dangerous, and that the only way of rendering him

harmless was by the application of forcible restraint. The prevalent idea seems formerly to have been that insane persons were regarded as being under some sort of external impulse which compelled them to commit acts against their will. It is now known that with rare or temporary exceptions insane persons are susceptible of influences very similar to those by which other persons are affected. They can be made to feel the effect of discipline, and can appreciate, in a very considerable degree, the painfulness of reproof and the pleasure of approbation. The consequence is that to-day patients in asylums or mental hospitals are scarcely ever placed under physical restraint. Moreover, the modern method of treatment of insanity shows clearly that the moral and intellectual qualities are hardly ever *entirely* effaced.

There is now opened up a new and difficult enquiry, viz., whether or not an insane person is legally responsible for his acts in cases where there is sufficient evidence to show that he does not know the nature of his acts.

While it is not the purpose of this book to discuss the *criminal* responsibility of lunatics (inasmuch as this subject has already been dealt with elsewhere) it may be observed pertinently that it is unfortunate that the law of insanity should have been to so great a degree fashioned upon the practice in criminal cases; for this practice is rather the result of a series of compromises than an application of principles which are scientifically correct.

It is remarkable, moreover, that while the law relating to the *criminal* responsibility of lunatics has reached a comparatively advanced stage and that definite rules have been laid down for the guidance of Courts when dealing with cases in which the person convicted of crime pleads insanity, no such precision exists in regard to *civil* responsibility.

That the law relating to the civil responsibility of lunatics is in an unsatisfactory state, was evident to

Brett, L. J., who, in delivering judgment in the case of *Drew v. Nunn* in 1879 stated that he found that the law relating to the civil responsibility of lunatics "stood upon a very unsatisfactory footing." (a) The learned Recorder of Bristol (Mr. W. Blake Odgers, K.C.) stated at an interview in 1913 that the law as to a lunatic's liability for tort and capacity to enter into contracts rested upon very insecure foundation and that he was of opinion that careful research would reveal the fact that several of the modern cases were wrongly decided.

In view of the unsatisfactory state of the law referred to, the writer has attempted in the following pages to set out a statement of the law (*a*) as declared by Statute or by Courts of Justice, and (*b*) as, in the opinion of the writer, it ought to have been or should be declared to be, having regard to (i) reported cases: and (ii) the principles of the Common Law and of Equity.

Upwards of two hundred leading cases have been considered, the authorities referred to have been carefully examined, and the law of many other countries has been ascertained for comparative purposes—where this has been deemed desirable and useful—in dealing with some of the difficult problems which have presented themselves for solution.

The preparation of this work would seem to be rendered desirable in view of the following facts:—

(i) The present indefinite and unsatisfactory state of the law relating to the civil responsibility of lunatics.

(ii) The absence of any modern work in which the subject is adequately treated.

(iii) The number of the insane population of England (that is to say, the total number of lunatics, idiots, imbeciles and all feebleminded

(a) 4 Q.B.D., p. 665.

> persons, whether legally recognised as such or not), has increased steadily up to the year 1914 and that, although the rate of increase has not been so marked during the war, there appears to be no immediate prospect of any diminution of the large number of persons who occupy a peculiar position in the eye of the law, in the interest of whom and of the public the law should be clearly and definitely stated.

The attention of Parliament was directed some time ago to the necessity for dealing with the problem of the mentally unfit, and the result has been the passing of the Mental Deficiency Act, 1913 by which Statute elaborate machinery is set up with the object of taking steps for the care and detention of feebleminded persons other than lunatics in order to prevent such persons from propagating their kind and for the prevention of the many abuses to which feeblemindedness lends itself, both in regard to the sufferers themselves, to their relatives, and to the public.

In the same manner as the object of the Mental Deficiency Act, 1913, was to place the law relating to the care and control of feebleminded persons upon an efficient basis, so the object of this work is to examine the ground upon which the law as to the civil responsibility of lunatics and of the mentally defective rests, and to show that, however indefinite and contradictory the law may appear to be, the underlying principles thereof are sound and reasonable.

In the chapter on Definition and Classification an attempt is made to explain and to reduce into order the existing confused and confusing mass of technical terms relating to the insane and to the mentally deficient.

Inasmuch as in English legal history the law relating to tort was developed earlier than that relating to contract, the question of a lunatic's responsibility for

his torts is dealt with in an earlier chapter than that in which his capacity to enter into contractual relations is considered.

A chapter (Mental Deficiency in Relation to Tort) has been devoted to an examination of the relevant authorities with the object of giving a satisfactory answer to the question—Is a lunatic who is so insane as not to know what he is doing, responsible for his wrongful acts of omission and of commission ? Consideration is given also to the anomalous proposition (to be found in many of the Common Law Text Books) that while a lunatic escapes *criminal* liability, he is said still to be *civilly* liable for his torts.

In a chapter on Mental Deficiency and Contract, the law upon the subject as laid down by the Courts upon various occasions has been carefully considered and examined, as a result of which some conclusions are drawn which it is believed are consistent with principle and with authority. In the same chapter an attempt has been made to ascertain the principles upon which rests the incapacity of persons of unsound mind, and conclusions are arrived at which tend to mitigate the anomalous declaration that while a lunatic cannot exercise the franchise—on the ground that he has no mind—he is nevertheless said to be liable for his alleged contracts, unless it can be proved that the other party knew of his insanity.

Two chapters have been devoted to a consideration of the law relating to husband and wife as affected by the unsoundness of mind of one of the parties, and the laws of many foreign countries have been set out for comparative purposes.

The important question of the effect of unsoundness of mind upon testamentary capacity has been exhaustively considered, and an attempt has been made to state the existing law clearly and succinctly. The grounds for the repudiation of the old doctrine of the oneness and indivisibility of the mind

and consequent absence of testamentary capacity as laid down in *Waring v. Waring* (a) are carefully considered and the modern cases referred to.

The chapter on Evidence contains a statement of the respective views held by lawyers and by medical men on the difficult question of the nature of the test which should be applied in order to determine the responsibility which should be attached in respect of the acts of a person alleged to be of unsound mind. The legal position of the expert medical witness also is considered in this chapter.

In an appendix is given a summary of the chief powers and duties of the various judicial and public authorities upon which duties have been placed and powers conferred by the various Statutes relating to lunatics and to the feebleminded.

My thanks are due and are gladly acknowledged to Sir Robert Armstrong-Jones for many valuable suggestions on the difficult subject of classification and nomenclature, to my former colleague, Mr. J. S. Wessen of the Asylums and Mental Deficiency Department of the London County Council who kindly read the proof sheets, and to others of my former colleagues through whose help I have been enabled to avoid many technical errors relating to administrative law and practice. I am indebted to Mr. Philip E. Sumner of the University of London for compiling the Index.

In conclusion, I have to thank the Senate of the University of London, by whose assistance the publication of this book has been made easier to me.

W. G. H. C.

1 *Essex Court, April,* 1921.

(a) Infra.

INSANITY AND MENTAL DEFICIENCY

CHAPTER I

DEFINITION AND CLASSIFICATION

The difficulty of defining precisely the nature of insanity or of stating succinctly in what insanity consists has neen recognised, not only by every writer upon the subject, but by all—whether judges, legislators, or medical men—who have had to deal practically with the insane. A high legal authority—Lord Blackburn—when giving evidence before a Select Committee of the House of Commons some thirty years ago said:—"I have read every definition which I could meet with, and never was satisfied with one of them, and I have endeavoured in vain to make one satisfactory to myself. I verily believe that it is not in human power to do it."

Knowledge of the characteristics of insanity has, however, increased appreciably during the past thirty years, so that it is now possible to give a definition of insanity which is both comprehensive and satisfactory.

In comparing the legal with the medical definition of insanity, it will be observed that there is a wide difference of opinion between the legal view and the medical view as to the precise nature of insanity. It must be remembered, however, that lawyers and medical men approach the subject each from a different point of view: for this reason the lawyer is no more entitled to assert that the medical test of insanity

is impracticable than the medical man is justified in stating that the legal test is inadequate.

For the purposes of this treatise the words "insanity" and "lunacy" are interchangeable terms and are used throughout to denote the same thing, *i.e.*, unsoundness of mind.

Medical Definition of Insanity

According to an eminent specialist in mental diseases (a), insanity is disorder of brain producing disorder of mind; in other words, it is a disorder of the supreme nerve centres of the brain—the special organs of mind—producing derangement of thought, feeling and action, together or separately, of such degree or kind as to incapacitate the individual for the relations of life (*i.e.*, the *social* relations of life).

There are, however, different forms of insanity known to medical men, and while in some of these forms the mind is completely and permanently disordered, in others the mind is only partially or intermittently disordered. It should be stated at the outset that insanity does not mean one disease to be diagnosed by a single characteristic, but is a group of symptoms, *i.e.*, a symptom-complex, each of which has its more or less characteristic features, its special course and more or less special cause, and its particular termination.

Although the law is not concerned with the causes of insanity, a classification of the main characteristics which differentiate each of the chief forms of insanity will be of assistance in estimating the probable effect of insanity upon the question of the civil responsibility or capacity of persons who are proved to be of unsound mind (b).

(a) Dr. Henry Maudsley, *Responsibility in Mental Disease*, p. 15.

(b) *Note*—With the exception of those cases in which modern scientific research has revealed the need for a different or more precise sub-division, the classification adopted by Dr. Maudsley has been followed throughout this treatise.

Unsoundness of mind or feeblemindedness is commonly divided into two great classes :—

(i) where there is absence or weakness of mind (*amentia*) : and

(ii) where the mind which once was normal has subsequently become deranged (*dementia*).

Within the first class are included idiots, imbeciles and all other mentally defective and feeble-minded persons ; while the second class comprises lunatics of all grades.

Idiocy is a defect of mind which is either congenital, or due to causes operating during the first few years of life before there has been a development of the mental faculties. Idiots are not only incapable of earning their own living, but they are incapable of preserving themselves from the risks of physical harm which are present in their ordinary physical environment. They are unable to adapt themselves to the simplest environment, and this extreme degree of incapacity constitutes idiocy.

Imbecility exists where the defect of mind is so great that the sufferer is unable to earn his own living. Imbeciles may be capable of executing simple work under supervision, but their services have not sufficient market value to secure employment at such remuneration as enables them to support themselves. They are unable, without assistance, to adapt themselves to their general environment because their intellectual powers are not sufficiently developed. It is this degree of deficiency of development which constitutes imbecility. The line of demarcation between the dull or weak-minded man and the imbecile is precisely the ability to earn a living.

Morons are the highest grade of feeble-minded persons : they are mentally defective adults whose

intelligence is equal to that of a normal child between the ages of seven and twelve years (a).

For the purposes of public administration, idiots, imbeciles, feeble-minded persons, and moral imbeciles have been defined in the Mental Deficiency Act, 1913 as follows :—

(i) *Idiots ;* that is to say, persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers.

(ii) *Imbeciles ;* that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of managing themselves or their affairs.

(iii) *Feebleminded persons ;* that is to say, persons in whose case there exists from birth, or from any early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision or control for their own protection.

(iv) *Moral Imbeciles ;* that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect.

In this connexion Dr. A. F. Tredgold, says that it is significant that the nature of the test of mental deficiency which is applied both by the Legislature and by the medical profession is the same, *i.e.*, social incapacity (b).

(a) This term originated in America and has now been adopted in England.
(b) At a lecture delivered at the University of London on 18th October, 1920.

The medical profession regards idiots as entirely irresponsible for their acts (a), and inasmuch as imbeciles as well as idiots cannot through deep defect of mind earn their own living, it would seem that they also are regarded by medical authorities as wholly irresponsible for their acts. It would appear that medical men regard idiots and imbeciles as irresponsible for their acts by the analogy which exists so far as regards state of mind between them and infants of tender years.

The Common Law seems to have proceeded on similar lines, inasmuch as neither infants of tender years nor idiots nor imbeciles have ever been held responsible for their acts.

Inasmuch, therefore, as the purpose of this treatise is to deal chiefly with the effect of *insanity*—in all its multifarious forms—upon the question of legal responsibility, the remainder of this chapter will be devoted to a consideration of the various species of insanity into which lunacy (*i.e.*, the second class referred to on p. 3 above) has been sub-divided.

The manifold varieties of lunacy or insanity—as distinguished from idiocy and imbecility—may, with certain exceptions to be mentioned later, be arranged into three main divisions according as there is derangement (i) of thought; (ii) of the affections or feelings; and (iii) of the will. The first division comprises all those cases in which there is insanity of thought, or insanity *with* delusion, and may be described as *Intellectual* or *Ideational Insanity*: the second division comprises all those cases in which, *without* delusion or incoherence, there is derangement of feeling or of the emotions, and may properly be described as *Affective Insanity*: and the third division comprises all those cases in which there is derange-

(a) Dr. Henry Maudsley, *Responsibility in Mental Disease*, pp. 6-8.

ment of the will as evidenced in the group of the so-called Aboulic cases, such as those of impulse, obsessions and imperative ideas.

Examination of the cases of *Intellectual Insanity* shows that there are some cases in which the derangement of thought is general: and others in which the derangement of thought appears to be limited to one subject, or to a particular group of ideas, while the understanding in other matters is tolerably clear. The former cases are included under the class of what is termed *General Mania*, which may be acute or chronic, and the latter under the class of *Partial Mania* which is always of a chronic nature.

General Mania. In this case the general derangement is unequivocal and, for this reason, it is seldom, if ever, that any question arises or is likely to arise in regard to the responsibility of a person afflicted with this form of insanity.

Partial Mania. The chief characteristic of *Partial Mania* is that the patient entertains either one delusion only, or one group of delusions only, apart from which his conduct may be normal. This is the most difficult form of insanity with which the law has to deal, inasmuch as it is extremely difficult, even for an asylum physician, to state positively that the disease of the brain which results in the delusion has or has not affected the patient's mind in other directions. The difficulty appears to lie in the fact that, inasmuch as conduct is the only satisfactory test of insanity, the materials whereby the extent of the insanity may be ascertained are subject to much limitation.

Dementia. When any of the common forms of insanity (*e.g.*, *general or partial mania*), has continued for a considerable time without any amelioration, the mind frequently becomes very much weakened, and the patient, having passed through degrees of mental derangement, lapses finally into a condition known as *dementia*. Here the mind has been destroyed by

disease, and the destruction may be more or less general and complete: in the worst cases demented patients possess as little intelligence as the complete idiot, from whom they differ only in having lost that which the idiot never possessed.

Affective Insanity. Included under this division are the affective states of exaltation and of depression (melancholia), which when present in excess are pathological and not physiological.

Insanity where there is derangement of the will is divided into two sub-classes, *viz.*, (i) *Impulsive Insanity* and (ii) *Moral Insanity.*

Impulsive Insanity. The main characteristic of this form of insanity is that, although the patient may be entirely free from delusion, he may be seized with an impulse which drives him, in spite of reason and against his will, to commit an act which involves a serious breach of the law. Suicide, and homicide, with its various attendants, (*e.g.*, assaults upon unprotected persons), are the most common tendencies of persons suffering from impulsive insanity. Such persons have been known to have committed murder, arson, damage to property, etc., without having any ill-feeling whatsoever against the person whom they injure, or without having any purpose to serve by what they do.

The importance of ascertaining in a case of an action of tort, for example, whether or not the defendant was suffering from impulsive insanity, cannot be exaggerated.

Moral Insanity. In this form of insanity, as in impulsive insanity, there is no delusion, but the symptoms are chiefly those of disorder of the moral sentiments. Persons suffering from this form of insanity may engage in projects of social or political reform, or launch into commercial speculations quite foreign to their natural character and habits. Such patients become disregardful of truth and not infre-

quently display a complete indifference to the feelings of those who are related to them.

In addition to the varieties referred to above, there are also three other common types of insanity which are not included under either of the three main divisions mentioned on p. 5, *viz.*, (i) *Epileptic Insanity*, (ii) *Senile Dementia*, and (iii) *General paralysis of the Insane*.

(i) *Epileptic Insanity*. There is a very close connexion between epilepsy and insanity. Dr. Maudsley states that an old author, Zacchias, declared that every epileptic ought to be regarded as irresponsible for acts committed by him within three days before or after an epileptic attack, and Dr. Maudsley himself says that it is an undoubted effect of epilepsy in some instances to produce mental derangement of a furious kind (a). This form of insanity manifests itself chiefly by irritability, moroseness, and perversion of character, with periodical exacerbations of excitement, in which criminal or tortious acts may be perpetrated without the patient's being able to control himself in any degree.

(ii) *Senile Dementia*. The characteristics of this form of insanity may be stated shortly to be the symptoms which mark the natural decay of mind in old age. There is first the loss of memory, then impairment of perception, incoherent talk, incapacity of comprehension, until, finally, there is complete mental decay.

Patients suffering from this form of insanity in its early stages occasionally exhibit extraordinary activity in business, making sales or investments of an unusual character: in addition, they are commonly impatient of advice or of opposition and resent all interference or control. The effect of insanity of this sort upon the mind of the sufferer may be of great importance in determining whether or not the defen-

(a) *Responsibility in Mental Disease*, p. 228.

dant to an action upon an alleged contract had the capacity to enter into a valid agreement.

(iii) *General Paralysis of the Insane.* There is one striking form of insanity in which mental symptoms of a tolerably uniform character are accompanied by symptoms of gradually increasing paralysis of the muscular system, and which runs a definite course to a fatal termination; it is usual, therefore, to make of it a special class under the name of *General Paralysis of the Insane.* This is a departure from the principle of classifying insanity according to its prominent mental features; the bodily symptoms which accompany the mental derangement are taken into account, and made the basis of the nomenclature.

This form of insanity exhibits not only the same kind of elevation of mind but the same thickness of articulation, the same unsteadiness in the gait, the same clumsy inefficiency of the digital movements which characterise drunkenness.

In general paralysis, as the enhancement of the nervous tension is so much more exaggerated, the vagaries of self-consciousness are much more extravagant. While the drunken man will content himself with the claim to be considered the strongest man in the room, the general paralytic considers himself the strongest man on earth (a).

In conditions of exaltation there generally exist delusions of self combined with delusions of environment. The general paralytic believes not only, in spite of his manifest infirmities, that he is "all right," in splendid health and capable of boundless activity; but also, in spite of the comparatively sordid surroundings of a public asylum, he believes himself to be in a palace, and that he is the possessor of untold wealth. His bearing and demeanour are eager and

(a) *Cf.* Sir George Savage's words:—"To the alcoholic all things are possible."

restless and he is constantly in motion. He meddles with everything with which he comes into contact, and writes innumerable and unnecessary letters.

From the foregoing considerations it will be seen that a person suffering from general paralysis of the insane may be expected to commit unlawful acts or to attempt to enter into ridiculous contracts, as a consequence of the state of his mind.

Drunkenness and Insanity. Dr. Charles Mercier says that " there is no form of insanity that may not be simulated by a case of drunkenness : and when it is not known, from other sources of information, that these manifestations are due to drink, no expert in the world, however skilful, could distinguish between the insanity that is due to alcoholic poisoning and the insanity that is due to other causes." (a).

Insanity from which a person is suffering may be the transient insanity of drunkenness or the permanent insanity of general paralysis ; but if the manifestations of drunkenness be identical with those of insanity, it might with reason be stated that the drunkard so long as he is drunk, is mad. In other words, it is strictly and literally true that when, and in so far as, a man is intoxicated by alcohol, then and to that extent, he is insane. Yet, inasmuch as the cause is obvious, the condition temporary, and as the manifestations of the insanity as a rule differ somewhat from those in insanity due to other causes, the insanity due to acute alcoholic poisoning is not usually regarded as lunacy. It is called by a different name, and is considered a different thing, but in essential nature the two are identical.

Dr. Charles Mercier refers to the similarity in regard to effect upon the mind between drunkenness and insanity in the following words :—" That the resemblance of the manifestations of drunkenness to those of insanity means a real identity in nature between

(a) *Sanity and Insanity*, p. 319.

the two conditions, and is not merely a far-fetched analogical resemblance, is shown by two circumstances; first, that there is a well-marked and distinct variety of insanity which reproduces with minute faithfulness the characteristic signs that ordinary cases of drunkenness display; and second, that every form of insanity is reproduced with accurate simulation by some case of drunkenness." (a).

Old English Definitions.

Throughout the history of English Law there has been a striking lack of consistency and of comprehensiveness in the legal terminology of lunacy. The various terms which have been used to indicate insanity have not hitherto been used in any uniform sense and it is remarkable that there exists no nomenclature which distinguishes civil incapacity of lunatics from criminal incapacity.

According to Sir E. Coke (b), Littleton's explanation of the expression "*non compos mentis*," (which Coke claimed to be "most sure and legall") is that it includes all persons who were "of no sound memory." He repudiates as indefinite and unsatisfactory the terms, *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus and stultus*. He divides persons *non compos mentis* into four classes:—

(i) *Ideota*, who from his nativity, by a perpetual infirmity, is *non compos mentis*.

(ii) He who, by sickness, grief, or other accident, wholly loses his memory and understanding.

(iii) A lunatic who sometimes has his understanding and sometimes not, *aliquando gaudet lucidis intervallis*: and therefore he is called *non compos mentis*, so long as he has not understanding.

(a) *Sanity and Insanity*, p.319. (b) Co. Lit., 246.

(iv) He who, by his own vicious act, for a time deprives himself of his memory and understanding, as he who is drunk; *i.e.*, *voluntarius dæmon*.

In Beverley's case (a) the definition is more definite and comprehensive. It was held in that case that a man *non compos mentis* was "he who *was once* of good and sound memory, and by the visitation of God has lost it."

The term "lunatic" appears on the Statute Book for the first time in the reign of Henry VIII. (33 Hen. 8. c.20) and is then used definitively to denote persons who have become insane since birth.

While in the Statute of Henry VIII above referred to the word "lunacy" is used as an alternative for "madness"; in 2 and 3 Edward 6, c.8., the words "lunatic" and "idiot" are used indiscriminately.

Both Sir E. Coke in Beverley's case and Sir Matthew Hale in his "Pleas of the Crown" use the term "lunatic" as including persons whose insanity is temporary or intermittent. Hale, whose definition agrees in the main with Coke's, describes dementia, or insanity, as being (i) idiocy or fatuity *a nativitate vel dementia naturalis*; (ii) *dementia accidentalis vel adventitia*, which may be classified as (1) partial; either (a) in respect of things *quoad hoc vel illud insanire*; or (b) in respect of degrees: and (2) total. This second class is further divided by him into (i) permanent or fixed, when the insanity is called *phrenesis*, and (ii) interpolated, by certain periods or vicissitudes, when it is called lunacy. Hale includes within his second class of insanity also a further classification, *viz.*, (i) when the mental defect is more dangerous and pernicious, commonly called *furor*, *rabies*, *mania*; and (ii) less dangerous and pernicious unsoundness of

(a) 4 Coke, 123.

mind, as in deep *delirium* stupor; (iii) *dementia affectata*, *i.e.*, drunkenness (a).

Staundford reproduces Fitzherbert's definition as follows:—"And the manner of the tryall of hym to bee a foole naturall appears in the sayd Natura Brevium, fol. 233. That is to say, yf hee cannot tell to twenty pence or tell his age, or who was his father or mother, or such lyke thynges, thereby it may appear that hee hath no kynd of understanding, in that that is eyther for his profite or dammage. But if hee bee learned or apt to learne then is he no ideot, as Maister Fitzherbert there thinkes and Greene sayth in Saver de default that if hee bee able to beget eyther sonne or daughter hee is no foole" (b). To these Swinburne adds "that if one have so much understanding as he can measure a yard of cloth, or rightly name the dayes in the weeke, hee that can so doe shall not bee accounted an ideot or naturall foole" (c).

According to Sir William Blackstone the distinction between an idiot and a lunatic was that the law presumed an idiot to be incapable during his life of obtaining a complete degree of understanding so as to enable him to govern himself or his estate, while a lunatic was presumed to be capable of recovering the reason which he once possessed (d).

Lucid Intervals.

In many recent cases the determination of the legal capacity or civil responsibility of an alleged lunatic has depended upon whether or not the act or omission in question took place either while the alleged lunatic was suffering from partial insanity or during a lucid interval. It is important, therefore, to state in this chapter what is understood in law by the condition

(a) 1 Hale, P.C. 29. (b) Staundf. Pr. Reg., 34.
(c) Swin. on Wills, 42. (d) 1 Comm., pp. 302, 303, 305.

known as a lucid interval, especially also as this condition is commonly experienced by lunatics.

In the first place, it is interesting to note that according to Sir Matthew Hale, a lunatic who was alleged to have performed any act, whether lawful (*e.g.*, a contract), or unlawful (*e.g.*, a tort) and was known and proved to have *lucida intervalla* was presumed to have performed the act in one of those intervals (a).

Lord Thurlow said in *A.-G. v. Parnther* that by a lucid interval he understood " not a cooler moment, not an abatement of pain or of violence, or of a higher state of torture, not a mind relieved from excessive pressure, but an interval in which the mind having thrown off the disease, has recovered its general habit " (b).

The above statement of Lord Thurlow is qualified (i) by the dictum of Lord Eldon who, in *Ex parte Holyland* (c) said that a lucid interval is not necessarily a *complete* restoration to mental vigour enjoyed ; and (ii) by the dictum of Sir John Dodson, who said that it is not merely the cessation or suppression of the symptoms of insanity (*Dyce, Sombre v. Prinsep* (d)).

Roman Law Conception of Insanity.

The Roman Law seems to have made a distinction —though not very clearly marked—between persons of unsound mind : thus, the dangerous (*furiosi*) were those in whose case the insanity was more or less general ; the demented (*mente capti*) appear to be those lunatics who were suffering from partial insanity ; also the imbecile (*dementes*) and the prodigal (*prodigi*). The system of curatorship was intended for these cases of mental defect (e).

According to Sohm, the *furiosus* or person of un-

(a) Hale P.C., 1, 30.
(b) 3 Bro. CC. 441.
(c) 11 Ves. 10.
(d) 1 Deane at p. 110.
(e) Ortolan, Roman Law, p. 603.

sound mind was incapacitated from all juristic acts. He was also incapable of any delictual liability, and he could not make a will or witness a will (a).

Modern Legal Definition.

A lunatic is a person of unsound mind, (not being an idiot or an imbecile) who has either (i) been found to be a person of unsound mind by judicial inquisition, or (ii) been medically certified to be of unsound mind, and who is either incapable of managing his own affairs or is dangerous to himself or to others.

An eminent jurist, the late Mr. Justice Stephen, defined insanity as " a state in which one or more of the mental functions are performed in an abnormal manner, or are not performed at all by reason of some disease of the brain or nervous system " (b).

While the Legislature has found it necessary in Statutes relating to the administration of the estates of lunatics and to the care and treatment of lunatics in institutions to define what persons shall be deemed to be subject to the provisions of a particular enactment, it has been considered inadvisable to incorporate such definitions in this treatise inasmuch as they are particular definitions and, as such, have no general application to the law relating to the responsibility of lunatics.

It would appear that so far as regards capacity in contract and liability in tort—in fact, in all branches of civil responsibility—the law recognises no difference between the various terms used to indicate unsoundness of mind : moreover, in many works on the Common Law all persons of unsound mind are regarded as lunatics (*vide* the section on Medical Definition above).

Although the difference between the various forms

(a) Insts. of Roman Law, pp. 141, 143, 448 and 456.
(b) Steph. Hist. of Crim. Law in England, Vol. ii., p. 130.

of mental unsoundness is important for purposes of administration or for the treatment of the ever-increasing multitude of feeble-minded persons, the difference between a lunatic so found by inquisition and a person medically certified to be of unsound mind in accordance with the provisions of the Lunacy Acts is important in view of certain technical distinctions which need not be referred to here, the chief difference between a lunatic so found by inquisition and one not so found being that the latter has no " committee " to manage his affairs during the period of insanity.

CHAPTER II

MENTAL DEFICIENCY IN RELATION TO TORT

For historical reasons, the law relating to the *torts* of lunatics has been dealt with in this treatise before that relating to the *contracts* of lunatics, inasmuch as the Common Law principles of tort were evolved earlier than those of contract.

In the development of a legal system its rules come into existence with little direct reference to theory, and the various component parts of the system are framed, by slow degrees, to meet practical requirements as they arise. Nevertheless, legal instinct generally works upon a symmetrical plan: the rules of the Common Law of England, for example, usually possess a remarkable consistency so far as they relate to any one legal topic. Moreover, a stage is always reached—sooner or later—when legal minds turn naturally to the task of discovering the broad principles which underlie the practical rules of the law, and of thus evolving from empirical knowledge a conception of legal principle which is the only guide for the expansion of existing rules, for their application to novel circumstances and to changed conditions and which forms the only logical foundation for sound legal knowledge.

Notwithstanding this general statement, all attempts to find a common element in every act and omission which the law denominates tort have failed owing to the fact that careful examination of each of the several torts known to the Common Law shows that no such common element exists. No attempt,

therefore, is made in this treatise to frame a comprehensive definition of tort. Furthermore, inasmuch as the purpose of this chapter is to throw some light upon the problem of whether a lunatic is answerable and, if so, to what extent, for torts committed during his insanity, it has been found necessary, with a view to adequate treatment of the subject, to examine in detail each of the several kinds of *iniuria* known to the Common Law.

So far as can be ascertained by reference to the authorities up to and including the fifteenth century insanity was not regarded by the Common Law as a ground for mitigating liability for the payment of compensation to a person who had been injured in body or estate by a lunatic. Fitzherbert quotes a case which was decided in 1315 from which it would appear that insanity did not excuse a man even for crimes committed by him during an attack of lunacy. In the case referred to the man died *after* he had recovered his reason, as the result of wounds self-inflicted while insane, and his chattels were confiscated as though he had been in his senses at the time when he committed the felony. It is interesting, therefore, to find that Sir Matthew Hale, writing in 1787, explains that lunacy did not excuse a man from liability to pay damages in respect of a civil wrong committed by him "because such a recompense is not by way of penalty, but a satisfaction for damage done to the party" (a).

Bacon, writing circ. 1618, says in his explanation of Maxim XII (*Receditur a placitis juris, potius iniuriæ et delicta maneant impunita*) that "a lunatic can have neither will nor malice" (b).

It would appear from Bacon's statement, that there was in the *corpus* of the Common Law a principle by which a lunatic was regarded as not being wholly responsible for torts committed by him during insanity.

(a) Hale, P.C. I. 15, 16.
(b) Bacon, Maxims of the Law XII.

The leading text-books on the law of torts show that there is a lack of authority as to the liability of a lunatic for his torts (a). In view of this fact attention is drawn to a statement of the law of England upon this matter which was made by Lord Esher (M.R.) in 1892 when in *Hanbury v. Hanbury* (b) the learned Judge said that he was "prepared to lay down as the law of England that whenever a person does an act which is either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, that was an act for which he could be civilly or criminally responsible to the law *provided the disease of the mind of the person doing the act be not so great as to make him unable to understand the nature and consequence of the act which he was doing.*"

This is not the only occasion upon which the Master of the Rolls gave expression to the same opinion as to the state of the law upon this point, for in *Emmens v. Pottle* (1885) in reply to a statement by counsel that a lunatic may be liable for libel, he said: "That depends upon whether he is sane enough to know what he is doing." (c)

It is submitted that the dictum of Lord Esher (referred to above) constitutes a sound basis upon which enquiry may usefully be made. With a view, therefore, to the application, for the purposes of this treatise, of the principle enunciated by the learned Master of the Rolls, it is necessary that two matters be considered, viz :—(i) the essential elements of the tort committed, and (ii) the state of mind of the person by whom the tort is said to have been committed.

(a) This matter is referred to by a Judicial author (W. Markby, Judge of Calcutta), who in *Elements of Law*, p. 131, says :—"How far a person who is insane would be held responsible, in courts of civil procedure, for his acts or omissions independently of contract is a matter on which one is surprised to find our law books nearly silent."

(b) 8 T.L.R. 559 C.A. (c) 16 Q.B.D., p. 356.

Accordingly, in this chapter have been set out the elements of the main classes of tort known to the Common Law with a view to the application of the tests of insanity to which reference is made in Chapters I. and VII. dealing with "Definition and Classification" and with "Evidence of Insanity" respectively.

Trespass

(*a*) *Trespass to the person.*

(i) *Assault.* In the draft Criminal Code of 1879 an assault is defined as the act of intentionally applying force to the person of another directly or indirectly, or attempting or threatening by any act or gesture to apply such force to the person of another, if the person making the threat causes the other to believe upon reasonable grounds that the aggressor has present ability to effect his purpose.

(ii) *Battery.* According to Holt, C. J., in *Cole v. Turner* (a), the least touching of another in anger is battery; for, says Blackstone, (b) "the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner." Battery includes assault and although assault strictly means an inchoate battery, the word assault is in modern usage generally made to include battery and in this sense the word is used in the following pages.

Inasmuch as in the law of tort a very considerable area is covered by trespass, and in view also of a recent decision in the Courts of New Zealand, the chief decisions and opinions in regard to this tort are set out for consideration. These are as follows :—

(a) 6 Mod. 149. (b) Com. iii. 120.

(1) It is stated by Lord Bacon that "if a man be killed by misadventure, as by an arrow at butts, this hath a pardon of course; but if a man be hurt or maimed only, an action of trespass lieth, though it be done against the party's mind and will, and he shall be punished for the same as deeply as if he had done it of malice. . . . . So if an infant within years of discretion, or a madman, kill another, he shall not be impeached thereof; but if they put out a man's eye or do him like corporal hurt, he shall be punished in trespass" (a).

(2) Sir Matthew Hale, after enumerating the incapacities or defects in persons recognised by the law (among them dementia), states:—"Ordinarily none of these do excuse those persons that are under them from civil actions to have a pecuniary recompense for injuries done, as trespass, batteries, woundings: because such a recompense is not by way of penalty, but a satisfaction for damage done to the party" (b).

(3) In *Weaver v. Ward* it is stated that although a lunatic is not liable for a felony he is yet answerable in trespass for an injury done to another. Trespass, it is there stated, "tends only to give damages according to hurt or loss" (c).

(4) In *Mordaunt v. Mordaunt*, Kelly, C. B., stated:—"It is true that a judgment of dissolution may operate as a punishment and so also may any verdict or judgment in a civil action. . . . Yet in all or any of these cases insanity is no defence, and no bar to the suit, and no ground for a stay of proceedings" (d).

These authorities are open to some serious criticism.

(a) Spedding's Ed. Lord Bacon's Works, Vol. VII., p. 348.
(b) Pleas of the Crown, Vol. I., p. 15.
(c) (1616) Hobart 134.
(d) L.R. 2 P. & D., p. 142.

In the first place, each of the four English "authorities" is mere *obiter dictum*. The first two, as statements of sages of the law, command respect, but they may properly be disregarded if they can be shown to be contrary to legal principle as authoritatively laid down by the Courts.

With regard to Lord Bacon's statement, it will be noticed that he expressly refers first to an "infant within years of discretion," thus suggesting a possible qualification of the liability of an infant which is quite inconsistent with his general statement as to the nature of trespass, and with the unqualified liability attributed to a lunatic.

As to *Weaver v. Ward* (a), a perusal of the whole judgment will show that the statement regarding the liability of a lunatic is inconsistent with the main conclusion of the judgment. "Weaver brought an action of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the Lords of the Council, a trained soldier in London . . . and so was the plaintiff, and that they were skirmishing with their musquets charged with powder . . . and as they were so skirmishing, the defendant *casualiter et per infortunium et contra voluntatem suam*, in discharging of his piece, did hurt and wound the plaintiff. . . . And, upon demurrer for the plaintiff, judgment was given for him: for though it were agreed that if men tilt or tourney in the presence of the King, or if two masters of defence playing their prizes, kill one another, that this shall be no felony; or if a lunatic kill a man, or the like, because felony must be done *animo felonico*. Yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass: And therefore no man shall be excused of a trespass (for this is the nature of an ex-

(a) Supra.

cuse and not of a justification, *prout ei bene licuit*) except it may be judged utterly without his fault. As if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff had ran across his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

This decision was considered in *Stanley v. Powell* (a), and it was there stated by Denman J. when delivering judgment that "what *Weaver v. Ward* really lays down is that no man shall be excused of a trespass except it may be judged utterly without his fault." If this comment be correct, then it is impossible to accept without qualification the dictum as to the liability of a lunatic.

It was certainly not held in *Weaver v. Ward* that liability is absolute in all cases notwithstanding inevitable accident, inasmuch as it was laid down that in trespass no man shall be excused "except it may be judged utterly without his fault." The defendant's plea was held bad because it only denied intention and did not properly bring before the Court the question whether or not the accident was inevitable.

As to the dictum of Kelly, C.B., when this was cited by Counsel in the case of *Emmens v. Pottle* (b) Lord Esher, M.R., interjected :—"That depends upon whether he is sane enough to know what he was doing." The qualification thus suggested is, it is submitted, supported by the authorities to be noted, and is consistent with the comment upon *Weaver v. Ward* quoted above from *Stanley v. Powell*.

The question of the liability of a lunatic for his torts came directly before the Supreme Court and

(a) (1891) 1 Q.B. 86.
(b) 16. Q.B.D. 354.

Court of Appeal of New Zealand in *Brennan v. Donaghy* (a).

The following are the main facts relating to this case as reported in the New Zealand Law Reports :— Previously to the hearing of the civil action Brennan had been tried for the same assault as an attempt to murder and had been acquitted on the ground that he was a lunatic at the time of his committing the offence. By the Criminal Code of New Zealand a lunatic is a person who is labouring under natural imbecility or disease of the mind to such an extent as to render him incapable of understanding the nature and quality of the act or omission and of knowing that such an act or omission was wrong. The jury found that the defendant's insanity was absolute and that he was incapable of any voluntary act. What the defence relied upon was that an injury committed by the defendant was, in the light of the facts, indistinguishable from an unavoidable accident.

It was held both in the Supreme Court and in the Court of Appeal that the lunacy of the defendant was not a defence. These judgments are weighty authorities, and would be considered with respect by any English or Colonial Court, but it is submitted with all deference that they are unsatisfactory in principle and that the balance of English authority is against the view which they represent. Sir Frederick Pollock in his book on Torts (b) refers to this decision as follows :—" It has been held in New Zealand in 1901 (*Brennan v. Donaghy*) that a lunatic is civilly liable for assault (presumably, therefore, for any kind of trespass) even if he be unconscious of the nature and consequences of his acts and incapable of understanding them. This decision is erroneous in principle and is not required by any English authority. The defence is not that the actor was insane, but that there was no real voluntary act at all. Liability can

(a) 19, N.Z. L.R. 289. (b) 10th Ed., p. 56.

be imposed in such a case only upon the obsolete theory that inevitable accident is no excuse."

The decision of the New Zealand Courts was based, to a very large extent, upon the American case of *Williams v. Hays* (a) where the Supreme Court of New York held that an insane person is just as responsible for his torts as a sane person. The Court admitted, however, " that a lunatic is not liable for those torts in which malice and therefore intention *actual or imputed* is a necessary ingredient, *e.g.*, libel, slander, or malicious prosecution."

Mr. Justice Earl proceeded as follows :—" In all other torts intention is not an ingredient and the actor is responsible, although he acted with a good and even laudable purpose without any malice. The law looks to the person damaged by another and seeks to make him whole without reference to the purpose or condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinion of judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort-feasors may not simulate or pretend insanity to defend their wrongful acts causing damage to another. The lunatic must bear the loss occasioned by his torts as he bears his other misfortunes and the burden of such loss may not be put upon others."

In this case the American authorities are reviewed, from which it appears that the American rule is said to be based upon the English cases of *Weaver v. Ward* (b) and *Cross v. Andrews* (c) neither of which is an authority for the American doctrine of a lunatic's

(a) (1892) 42 Amer., St. Rep. 743. (b) Supra.
(c) Cro. Eliz. 622.

responsibility for his torts. The former case has been dealt with above, and the latter case decides only that an innkeeper cannot plead insanity as a discharge of liability for not keeping safely the goods of his guest. "This" says Mr. Beven, "is manifest enough: business was carried on either by or for the lunatic, and in either case he could not avoid responsibility (a)."

The rule that "where one of two innocent persons must bear a loss, he must bear it whose act caused it" is not, in this absolute form, in accordance with the authorities; while the reasons of public policy which are put forward are totally unsupported.

It would seem that the learned Solicitor General for New Zealand (Sir John Salmond) agrees with the opinion of Sir Frederick Pollock that the decision in *Brennan v. Donaghy* is erroneous in principle, and says that the American rule that a lunatic will be judged in an action for negligence exactly as if he were sane seems much too absolute (b).

That both of the New Zealand Courts ignored the fact that in trespass to the person there must be a voluntary act coupled with either intention or negligence is manifest from a perusal of the judgments delivered by Conolly, J. in the Supreme Court and by Stout, C. J. in the Court of Appeal.

According to Clerk and Lindsell, the Common Law of England is as follows:—"If a lunatic commit a trespass while in a state of frenzy he will not be liable any more than a sane man who does a similar act while under the influence of sudden terror which deprives him of all power of deliberate choice (c)."

The chief authorities which can be relied upon for the decision in *Brennan v. Donaghy* are the four cases and opinions stated above (p. 21). These authori-

(a) Negligence in Law, p. 47.
(b) Law of Torts, 2nd Ed., p. 62.
(c) Law of Tort, 6th Ed., p. 50.

ties having been considered earlier, it remains to consider the authorities for the opinion that the case of *Brennan v. Donaghy* was wrongly decided.

In view of the fact that there exists no authority directly touching the question of a lunatic's liability, one is compelled to turn to general principles. In other words, one must see what view the Courts have taken when the question of the *nature of trespass* has come before them. Now, in the first place, it is clear law that a man is not liable for inevitable accident, but that, in such a case, damage must rest where it falls. Two recent cases establish this beyond controversy, *viz.* :—

(1) *Holmes v. Mather* (a). In this case the defendant's horses, while driven by his servant in a public highway, ran away and became so unmanageable that, although the servant could not stop them, he could, to some extent, guide them. The defendant, who sat beside his servant, was requested by the latter not to interfere and complied with that request. While trying to turn a corner safely the servant guided the horses so that, without his intending it, they knocked down and injured the plaintiff who was in the highway. The jury found that there was no negligence and it was held that the act of alleged trespass was not a wrongful act. In reviewing the earlier cases quoted in the argument, Bramwell, B., stated :—" As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough : if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of the negligence. Where the act is not wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if

(a) L.R. 10 Ex. 261.

it were wrongful. That is the effect of the decisions (a)."

(2) *Stanley v. Powell* (b). The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and accidentally wounded the plaintiff who was engaged in carrying cartridges and game for the party. It was held that a trespass to the person is not actionable if it be neither intentional nor the result of negligence. *Weaver v. Ward* and other shooting cases were fully considered by the Court with the result that inevitable accident was held to be a good answer to an action of trespass to the person.

As stated above (p. 24) this matter is discussed in Pollock on Torts (c) and the learned author comes to the conclusion that, in spite of some conflict in the cases, inevitable accident (in the popular sense) is a ground of excuse, and he disagrees with the statements made in argument by Erskine in the case of *The Dean of St. Asaph* (d) that "if a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete answer to an *indictment* for trespass, but he must answer in any *action* for everything he has broken."

The learned author of Beven on Negligence (e) says in considering *Weaver v. Ward* that "it is hard to see why, in the case of the lunatic, an exception should be made to the general rule that one is excused responsibility for the consequence of his act, if in the words of the judgment in *Weaver v. Ward* it may be judged utterly 'without his fault': or supposing there be no exception, why 'if a man by force take my hand and strike you,' I should not be liable: while if a lunatic—not in the sense of one merely of defective intelligence, but of one wholly without

(a) L.R. 10 Ex. at p. 268.
(b) [1891] 1 Q.B. 86.
(c) 10th Ed., p. 135.
(d) 21 St. Tr. 1022.
(e) 3rd Ed. pp. 46 and 47.

intelligence—hurt a man he is answerable." The same author points out (a) that in the case of partial comprehension of his act by the lunatic no difficulty can arise; while in the case of utter irresponsibility, where alone the point can arise, the lunatic would in most cases be able to do harm only through the neglect of some responsible agent who would be answerable *in propria persona*. The injured person would, therefore, not be without a remedy even where the lunatic is not to blame; in most cases the remedy against the responsible authorities of an asylum, or in the case of patients under private control, against him in whose control they are, would be ample.

If we turn next to the reason why a man is not liable for damage which, though caused by his act, is yet the result of inevitable accident in the popular sense, we are driven to the conclusion reached by Mr. Justice Holmes after consideration of the authorities that the law does, in general, determine liability by blameworthiness subject to the limitations that minute differences in character are not allowed for and that the standards by which the law measures a man's conduct are necessarily external. This being so, the standard must, in theory, be capable of being known (b). "The law," he states in concluding his investigation, "does not adopt the coarse and impolitic principle that a man always acts at his peril. On the contrary, its concrete rules, as well as the general questions addressed to the jury, show that the defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct; and it is certainly arguable that even a fair chance to avoid bringing harm to pass is not sufficient to throw upon a person the peril of his conduct, unless judged by average standards he is also to blame for what he

(a) *Ibid.*, p. 47.
(b) The Common Law, p. 111.

does (a)." It is worthy of note that this expression of opinion, written in 1881, is clearly borne out by the subsequent decision in *Stanley v. Powell* referred to above.

If Sir Frederick Pollock and Mr. Justice Holmes be right—and it must be borne in mind that their views are not based upon theory only, but upon a close investigation of the authorities—then it is impossible to resist the conclusion that unsoundness of mind of such a degree as to prevent the defendant from knowing what he was doing is a valid defence to an action of trespass. In what respect should the act of a madman differ in consequence to him from that of a sleepwalker, or from that of a person who is seized with a fit and in consequence falls through a shop window? Again, why should a distinction be drawn between external compulsion—as in the hypothetical case put at the end of the judgment in *Weaver v. Ward*—and total absence of a controlling mind? Wood Renton commenting on *Weaver v. Ward* says :—" If an exception is to be made in favour of compulsion, it is difficult to see on what principle its extension to total incapacity can be resisted (b) ; " and it is submitted—and the statement is supported by the language used by Lord Esher in *Hanbury v. Hanbury* (c)—that such incapacity would be a valid defence in any action based on tort.

With regard to the English Authorities, it will be seen that the decision of the New Zealand Courts in *Brennan v. Donaghy* is based upon numerous *dicta*, all of which, however, are expressly or impliedly founded upon the theory that in trespass intention is wholly immaterial and that the law aims simply at giving compensation for damage done. Such a theory is contrary to the latest decisions of the English

(a) *Ibid.*, p. 163.
(b) Law of and Practice in Lunacy, 1st Ed., p. 64.
(c) 8 T.L.R. 560.

Courts and is against legal principle as laid down by high authorities. Sir Frederick Pollock states definitely that *if there be no voluntary act* there can be no trespass (a).

With reference to the foregoing statement of Sir Frederick Pollock, it may be observed that in many cases of hypnotism persons have been known to perform various acts the nature of which demonstrates clearly that the "subjects" were completely devoid of the power of controlling or of directing their acts (b). According to the decision in *Brennan v. Donaghy*, however, a hypnotised person would be held responsible for torts committed by him while in this condition of *quasi*-somnambulism. It is submitted that by no rule of the Common Law of England could liability be imposed in such a case. While it is admitted that there may be practical difficulties of proving the fact of hypnotism, the possibility of the commission of torts by hypnotised persons is a contingency with regard to the legal result of which the law should be able, on principle, to deal.

It should be borne in mind that the conclusion arrived at, *viz.*, that a lunatic cannot be held liable for trespass, can apply only where the lunatic is so insane as to be incapacitated totally from knowing what he was doing or from knowing that his action was wrong. The strictest proof of the existence of such a state of mind must be insisted upon by the law; but in cases where total incapacity has been established to the satisfaction of the Court (as has been shown was the case in *Brennan v. Donaghy*) insanity ought to be admitted as a valid defence to an action of trespass. If insanity be a valid defence to an action of trespass to the person, it ought to be also a valid defence to an action of trespass to land and to goods.

(a) Pollock on Torts, 10th Ed., p. 39.
(b) Dr. Hack Tuke, "Sleep-walking and Hypnotism," pp. 51 *et seq.*

(*b*) *Trespass to Land.*

Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies although no actual damage is done (a).

A person unlawfully enters on land if he wrongfully sets foot on, or rides, or drives over it, or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or places or fixes anything on or in it; or places, or suffers to continue on his own land anything which permanently overhangs the land of another, or discharges or causes water to flow upon such land, or suffers filth, or any injurious substance which has been collected by him on his own land to pass to another's land (b).

In the words of Lord Camden, L.C.J., in *Entick v. Carrington*, "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil (c)."

The question of responsibility of a lunatic for trespass having been fully considered above under the heading of "trespass to the person," where it has been shown that inevitable accident is a good defence to an action for assault, there is no need to deal at length with trespass to land. It is instructive, however, to notice that in an American case it was held that, where a boy ran into his employer's shop in order to escape from a man who was pursuing him with a pick-axe, and in so doing accidently knocked out the faucet from a cask of wine and thus caused a quantity of wine

(a) Per Holt, C. J. in *Ashby v. White*, 1 Sm.L.C. at p. 262.
(b) *Blundell v. Catterall*, 5 B. & Ald. 268.
(c) 19 St. Tr. at p. 1066.

to be wasted, his pursuer, not the boy, was liable for the damage sustained by the shopkeeper (a).

Similarly, a lunatic who is so deluded that he has no concept of private property would seem not to be liable for trespass committed by him while under the influence of his delusion. From the point of view of the owner of the land, the trespass of such a lunatic is merely the result of inevitable accident and the damage lies where it falls.

(*c*) *Trespass to Goods.*

If one man take possession of or interfere with the goods and chattels of another, either by laying hold of, removing, or carrying away inanimate things, or by striking, killing, chasing or driving cattle, sheep or domestic animals in which the owner has a valuable property, he is guilty of a trespass and is responsible in damages, unless the act can be justified on the ground that it was done in necessary defence of the person, or of property, or in the maintenance of one's absolute or relative rights, or was done in obedience to some authority given by the party or by the law, or can be excused on the ground that it was the result of inevitable accident, or was caused by the act of the plaintiff himself (b).

The fact that inevitable accident is a lawful excuse to an action for trespass to goods as well as to trespass to the person would seem to be a reason for the exemption of lunatics from liability for trespass to goods when the act constituting the trespass is that of a person whose mind is so diseased that he is incapable of wrongful intention or of exercising ordinary human foresight and care. In other words, where the mental defect is so great that the act complained of is that of a mere automaton, it would seem that, by analogy to the cases on inevitable accident considered above, a

(a) *Vanderbergh v. Truax*, 4 Denio 464.
(b) *Kirk v. Gregory*, 1 Ex. Div. 55; *Farmer v. Hunt*, Brown, 220.

lunatic would not be liable for trespass to goods committed during such insanity.

Actions on the Case.

(*a*) *Defamation.*—(i) *Libel.*

Lord Blackburn in *Capital & Counties Bank v. Henty* (a) defined libel as a written statement published without lawful justification or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs injurious to them in their trade, or holding them up to hatred, contempt, or ridicule.

Baron Parke in *Parmiter v. Coupland* (b) said, "A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel." In *Gathercole v. Miall* (c) it is reported that when directing the jury the same learned judge said that a libel is "anything written or printed, which from its terms is calculated to injure the character of another, by bringing him into hatred, contempt, or ridicule, and which is published without lawful justification or excuse."

In the words of Lord Penzance in *Capital & Counties Bank v. Henty* (d) malice has always been held to be the gist of an action of libel. In order, therefore, that defamation may be actionable the statement complained of must be malicious. The question as to what is meant by the term "malice" as applied to cases of this sort has been a subject of careful consideration by the Courts from time to time. It would seem to be established that whatever may have been the origin or the original meaning of the phrase "falsely and maliciously" as used in the old form of pleading, malice in the modern law signifies neither more nor less, in this connexion, than a wrongful act

(a) 7 A.C. at p. 771. (b) 6 M. & W. at p. 108.
(c) 15 M. & W. at p. 321. (d) 7 A.C. at p. 767.

done *intentionally* without just cause or excuse (a). This statement of the law was referred to with approval by Lord Herschell in *Allen v. Flood* (b).

Mr. Innes says that the malice referred to is "the mere conscious violation of a right without just cause or excuse (c)."

Again, an authority on Libel says that a good defence to an action for damages in libel may be that there was no conscious publication on the ground of insanity (d).

According to Clerk and Lindsell (e) whether a lunatic can be sued for libel would seem to depend upon the question whether he was insane upon the subject to which the libel related. If he were insane, then, presumably, he would not be liable, inasmuch as liability in libel depends upon either an actual or implied consciousness that the matter published is defamatory. In other words, if a person be so far out of his mind that he does not know what he is doing, he cannot be said to act intentionally, and therefore cannot be responsible for any defamatory matter which he may publish.

In view of the fact that an infant occupies a privileged position both by Statute and at Common Law, on the ground that his mind is undeveloped, consideration is now given to the analogy which exists between the liability for libel of an infant and that of a lunatic in whose case the mind is impaired to such an extent that for many purposes he is more lacking in mental capacity than an infant even though the latter be a child of tender years.

The general law relating to the torts of infants is that they are liable if they are old enough to know that what they are doing is wrong; thus, a child of

(a) Bayley, J. in *Bromage v. Prosser*, 4 B. & C. at p. 255.
(b) (1898) A.C. at pp. 124–125.
(c) Principles of the Law of Tort, p. 169.
(d) Blake Odgers, "Libel and Slander," p. 771.
(e) Law of Torts, 6th Ed., p. 51.

tender years would not be held liable for defamatory words published by him. In the same way, if it were shown that at the time of committing the alleged libel the defendant was so insane as to be unable to understand the nature of his acts and that he was incapable of malice, it would seem that these circumstances would amount to such a valid excuse as would bring the case within the definition laid down by Baron Parke. In other words, a lunatic would appear not to be liable for publishing a false statement which he believed to be true and in regard to the publication of which there was in fact no real voluntary act at all. Furthermore, all mental experts are agreed that a person cannot be said to know and to intend the natural and probable consequence of his acts if his mind be so diseased as to render him incapable of regarding facts as they really are.

Dr. Mercier states that persons suffering from the common form of epilepsy known as *petit mal* have been known suddenly to become entirely unconscious, and, while in this unconscious condition, to have walked for a considerable distance, climbed over stiles, got through gates, avoided passing carts, and even answered when spoken to (a). It is submitted that by no rule of the Common Law of England would a man be held responsible, either civilly or criminally for wrongful acts done by him while in this condition, inasmuch as in respect of acts done while under the influence of disease such as this the actor can have no wrongful intention. In other words, such a man can have no *mens rea* while he is in the condition described above. The state of the mind of a lunatic who does not know what he is doing is precisely analogous to that of the person suffering from *petit mal*.

If the particular form of insanity from which a person is suffering be characterised by an entire absence of the capacity of intention, it woulds eem that a luna-

(a) Sanity and Insanity, p. 102.

tic would not be held liable for defamation. This would appear to be supported by the dictum of Lord Esher who in *Emmens v. Pottle* said that, " a lunatic *may* be liable for a libel but *only if he be sane enough to know what he is doing* (a)."

In conclusion, it would appear that from a careful consideration of the elements which constitute defamation and by analogy to the cases of epileptics and of infants of tender years, a lunatic is *prima facie* incapable of committing libel. Whether or not the particular form of the insanity from which the patient is suffering is such as to render him irresponsible through want of mind is a question of fact which in each case would require to be determined by the jury or by the Court with or without the assistance of expert medical witnesses.

(ii) *Slander.*

In Slander the defamatory words spoken falsely and maliciously must be accompanied by special damage, except in the following cases :—

(a) where the words obviously impute, or may fairly be understood as imputing, a criminal offence punishable by imprisonment without the option of a fine.

(b) where the words impute having a contagious disease which would result in exclusion from society.

(c) where the words convey a charge of unfitness, dishonesty or incompetence in an office of profit, profession or trade :

(d) where the words impute unchastity or adultery to any woman or girl.

The foregoing observations with regard to the liability of a lunatic for libel apply, *mutatis mutandis*, to slander.

(a) 16 Q.B.D., 354.

(*b*) *Malicious Prosecution.*

In certain cases of tort *express malice* must be proved in order to establish liability.

"Malice" means wickedness, but in legal phraseology it is used to signify the contemplation of the doing of a wrongful act towards another person. In its legal sense it ranges from "malevolence," as in injury committed in revenge, to the mere conscious violation of a right without just cause or excuse, as in a mere trespass.

Malice is said to have been present whenever the injurer contemplated harm to the person injured, though he may also have entertained a desire to benefit himself, and though the harm contemplated may be merely incidental to the fruition of that desire. It is present, therefore, though in different degrees, in the highwayman who murders a man to rob him of his purse, and in the trespasser who gets over a fence to commit a petty theft of a few flowers.

Malice is variously spoken of as "express malice," "actual malice," "malice in fact," and "malice in law," or "implied malice." The first three terms are identical in meaning. They signify such malice as had an actual existence which is required by law to be shown by evidence to be laid before the jury, as distinguished from "malice in law," or "implied malice," which in certain circumstances is presumed by the law to exist.

In an action for malicious prosecution "the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of a reasonable and probable cause; and, lastly, that the

proceedings of which he complains were initiated in a malicious spirit—that is, from an indirect and improper motive and not in furtherance of justice (a)."

From the foregoing statement of the elements of the tort of malicious prosecution, it will be seen that the existence of an indirect and improper motive on the part of the defendant is a necessary factor in order to make him responsible. In other words, the plaintiff cannot succeed in his action unless he can show that the defendant acted without reasonable and probable cause.

Inasmuch, therefore, as the gist of this tort is the presence of malice or the absence of reasonable and probable cause, it would appear that where, through lack of understanding, (*i.e.*, either through the mind's being undeveloped, as in the case of a child of tender years, or being impaired, as in the case of a lunatic) neither malice nor improper motive can be present, the defendant would not be held liable for malicious prosecution.

Nuisance

A nuisance is an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people (b). That is to say nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases, in the exercise of a common right (c).

It is not necessary for the purposes of this treatise to set forth all the different ways in which nuisance may be committed. It will suffice if we consider a

(a) Per Bowen, L. J. in *Abrath v. North Eastern Rly. Co.* 11 Q.B. Div. at p. 455 and quoted with approval by Lord Davey in *Cox v. English Scottish & Australian Bank* (1905) A.C. at p. 170.

(b) Per Knight-Bruce, V.C., in *Walter v. Selfe*, 4 D.G. & S. 322.

(c) Pollock on Torts, 9th Ed., p. 412.

typical case where one man's acts or omissions cause a nuisance to his neighbours, *i.e.*, cases to which the maxim "*Sic utere tuo ut alienum non lædas*" applies.

The rule laid down in the judgment of the Exchequer Chamber delivered by Blackburn, J. and approved by the House of Lords, is as follows:.. "We think that the true rule of law is, that the person who for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the Act of God . . . The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there—harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's—should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches" (a).

(a) *Fletcher v. Rylands* L.R. 1 Ex. 265; L.R. 3. H.L. 330.

In *Nichols v. Marsland*, Mellish, L. J. said, "when the law creates a duty and the party is disabled from performing it without any default of his own, by act of God, or by the King's enemies, the law will excuse him (a)." In view of these statements of the law, it would appear that where it can be proved to the satisfaction of the Court that the state of a lunatic's mind is such that he was disabled from performing the duty of using his property in such a manner that he does not cause a nuisance to his neighbours, he would not be held liable for this tort.

Deceit

The tort known as Deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and to act on a falsehood. This is one of that class of torts in which either a positive wrongful intention, or such indifference as amounts to guilty recklessness, is a necessary element: so that in Deceit liability is based not on a universal right of the plaintiff, but on the unrighteousness of the defendant.

In order to sustain an action of Deceit, there must be proof of fraud: nothing short of that will suffice. The statement complained of must comply with *each and all* of the following conditions:—

(i) It is untrue in fact.

(ii) The person making the statement, or the person responsible for it, either knows it to be untrue, or is reckless whether it be true or false (b).

(iii) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it (c).

(a) *Nichols v. Marsland* L.R. 10 Ex. 255.
(b) Per Lord Herschell in *Derry v. Peek*, 14 A.C. at p. 374.
(c) *Polhill v. Walter*, 3 B. & Ald. 114.

(iv) The plaintiff does act in reliance upon the statement, in the manner contemplated or manifestly probable, and thereby suffers damage (a).

(v) The statement must be in writing and signed in one class of cases, *viz*:—where the statement amounts to a guaranty: this requirement is statutory (b) and, for the purposes of this treatise, needs no further comment.

These conditions are considered *seriatim*.

(i) Mere expressions of opinion do not as a rule amount to deceit (c) but they may do so where, for example, the state of a man's opinion is a material matter. In order to prove fraud there must be actual misrepresentation of fact. Thus, where a prospectus is issued to shareholders in a company to invite subscriptions to a loan, a statement of the purposes for which the money is wanted is a material statement of fact, and, if untrue, may be ground for an action of deceit (d).

Suppressio veri is as much fraud as *suggestio falsi* (e): in other words, if by reason of the omission of material facts the statement as a whole is calculated to mislead a person ignorant of those facts into an inference contrary to the truth, there is fraud. In the words of Lord Cairns (f), "There must, in my opinion, be some active mis-statement of fact, or at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes

(a) *Barry v. Crosskey*, 2 J. & H. 22–3.
(b) Lord Tenterten's Act, 9 Geo. IV., C. 14. S.6.
(c) *Pasley v. Freeman*, 3 T.R. 51.
(d) *Edgington v. Fitzmaurice*, 29 Ch. Div. 459.
(e) *Stewart v. Wyoming Ranche Co.*, 128 U.S. 383.
(f) *Peek v. Gurney* L.R. 6 H.L. 403.

that which is stated absolutely false." In order to prove such fraud as the law considers sufficient to sustain an action, it is only necessary to show that what the defendant asserted was false within his own knowledge (a).

(ii) The state of mind of the defendant is the important feature in considering whether the person making the statement had a guilty intention to deceive. In the words of Lord Herschell, the statement must have been made "knowingly or without belief in its truth, or recklessly" (b).

In every case this is a question of fact which must be proved. As stated by Bowen, L.J., "The state of a man's mind is as much a fact as the state of his digestion" (c).

An honest though dull man cannot be held guilty of fraud any more than of "express malice."

(iii) It is a necessary condition of liability either that the misrepresentation complained of should have been made directly to the plaintiff, or that the defendant should have intended or desired that the plaintiff should suffer loss.

It is enough that the representation was made directly or indirectly in such a way that the defendant intended the plaintiff to act upon it, and that the plaintiff has acted in the manner contemplated and suffered damage which was a natural and probable consequence. Lord Selborne said that there must be that intention which the law imputes to every man to produce those consequences which are the natural result of his acts (d).

(a) *Chandelor v. Lopus*, Cro. Jac. 4; *Haycraft v. Creasy*, 2 East 92.
(b) *Derry v. Peek*, 14 App. Cas. at p. 371.
(c) *Edgington v. Fitzmaurice*, 29 Ch. Div. at p. 483.
(d) *Smith v. Chadwick*, 9 A.C. 187.

(iv) There must be action taken by the plaintiff as a result of the defendant's misrepresentation: it is not enough that the defendant *intended* the plaintiff to act in a certain way: no cause of action lies where the defendant made an unsuccessful attempt, however unrighteous, to deceive the plaintiff, as no actual damage has been caused. (a)

From the foregoing statement of the elements of the tort of Deceit, it appears that without guilty intention there is no cause of action. A child of tender years, by reason of the undeveloped state of his mind, would appear to be incapable of that *dolus* (unlawful intention) without which there can be no deceit. Similarly, it would appear that where the defendant is so insane as to be incapable of forming any intention at all he would not be held liable for damage sustained by a person who had acted upon his statements.

Furthermore, it may be mentioned that the only ground upon which corporations (which have no mind) have been held liable for fraud is where the above mentioned conditions have been complied with by a duly authorised agent of the corporation (b). By analogy, where a lunatic is so diseased as to have lost the power of reason (*i.e.*, where he has no mind), it would seem that he would be incapable of committing a fraud.

Negligence

"Negligence is a negative word; it is the absence of such care, skill, and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed" (c).

(a) *Bayley v. Merrel*, 3 Bulst. 95.
(b) *Barwick v. English Joint Stock Bank*, L.R. 2 Ex. 259.
(c) Per Willes J. in *Grill v. General Iron Screw Collier Co.*, 35 L.J. C.P. 330.

In *Heaven v. Pender*, Brett, M.R., said that actionable negligence "consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property" (a).

It will be observed that these statements go further than the actual words of Baron Alderson's dictum that negligence is "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (b).

The law does not, speaking generally, hold a man answerable for mere omission, and, unless he be under some specific or general duty of action, his omission will not, in any circumstances, be either an offence or a civil wrong. In order to prove negligence, it is necessary, first of all, that "some already existing relation must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act of the party held liable" (c).

In *Le Lievre v. Gould* (d) it was held by the Court of Appeal that *Derry v. Peek* has established the proposition that an action for negligence in making representations does not lie in the absence of contract, and that negligence is not actionable in the absence of some duty to be careful, created by contract, or by some well-established principle of law, such as that which obtains in the case of an invitation and in the cases of parties using the highway.

Negligence exists where the defendant has failed

(a) 11 Q.B.D. at p. 507.
(b) *Blyth v. Birmingham Waterworks Co.*, 11 Ex. at p. 784.
(c) Pollock on Torts, 10th Ed. p. 446.
(d) (1893) 1 Q.B. 491.

to perform such duty as the circumstances of the case placed upon him, and, to this extent, there must have been either recklessness as to the consequences of the omission, or there must have been wilful intention on the part of the defendant not to take such steps to avoid damage as would have been taken by an average prudent man. In other words, liability is based upon the assumption that the defendant is capable of being "guided upon those considerations which ordinarily regulate the conduct of human affairs." It would appear to follow, therefore, that a child of tender years would not be liable for acts or omissions which in the case of a person of full age would amount to negligence (a). By analogy to the child of tender years (whose incapacity is based upon his want of mind), a lunatic whose mind has through disease or accident become defective would seem not to be liable for actionable negligence, inasmuch as he has no capacity for acting as a prudent man.

Furthermore, the law requires that a person who is under a duty to another shall, in conducting his affairs, be bound to foresee that harm may result from his conduct. Consequently, he is liable for any damage which may result from his failure to exercise such foresight, provided the damage is not too remote. In other words, the defendant is under a duty to foresee whatever a prudent and intelligent man would have foreseen.

According to Sir Frederick Pollock, K.C. (b), liability in tort may be said to rest, to a large extent, upon the maxim "every man is presumed to intend the natural consequences of his acts." In the words of Bayley, J., in *R. v. Harvey* (c), "a party must be considered, in point of law, to intend that which is

(a) *Cooke v. Midland G.W.R. of Ireland* (1909) A.C. 229.
(b) Law of Torts, 10th Ed. p. 34.
(c) 2 B. & C. 257.

the necessary and natural consequence of that which he does." The term "acts" in the maxim includes wrongs of omission as well as wrongs of commission; so that Shepherd was held liable for putting out Scott's eye because the natural and probable consequence of throwing a lighted squib into a building full of people was the infliction of damage upon someone present (a): similarly, the omission on the part of a man in charge of a crane to warn passers-by in the street below that the goods were descending was evidence of negligence against the employer of the man who was working the crane (b).

The law has recognised that children of tender years are incapable of exercising the amount of care and caution which is demanded of an adult of normal mental capacity (c). By analogy, it is concluded that a lunatic whose mind is so diseased as to preclude him from foreseeing any of the consequences of his acts would not be held liable for the results of his negligence, inasmuch as he is incapable of that knowledge (or foresight) to which Mr. Justice Holmes attaches so much importance in the determination of liability in cases of alleged negligence (d).

A fortiori, where a lunatic is incapable of knowing what he is doing, *i.e.*, where he is not a reasonable being at all, he would appear not to be liable: the result in such a case being that the person damaged through the act or omission of the lunatic would be in a position analogous to that of a person who has suffered damage through inevitable accident—consideration of which follows.

Inevitable Accident.

The question of liability for damage caused by inevitable accident was fully considered in *Stanley v.*

(a) 2 W. Bl. 892.
(b) 3 H. & C. 596.
(c) *Cooke v. Midland G.W.R. of Ireland* (1909), A.C. 229.
(d) Common Law, p. 174.

Powell (a) where it was held that a sportsman was not liable for the damage sustained by a beater who lost the sight of an eye as a result of a bullet's glancing off a tree and striking the eye ; the *ratio decidendi* was that the act complained of was unintentional and was not due to the negligence of the sportsman.

In the case of *McDonald v. Snelling* (b), A., by careless driving of his horse, ran his carriage into B.'s carriage and so frightened B.'s horses that they ran into the carriage of C., with the result that damage was done to C. and to his carriage. In this case B.'s failure to manage his horses was due to their being taken out of his control through the negligence of A. It was held that B. was not liable, inasmuch as his action was involuntary and, therefore, not independent.

Similarly, it would seem that where the driver of a carriage suddenly went mad and, while insane, drove so negligently that another user of the highway sustained damage, the lunatic, while being under an absolute duty to drive his carriage properly, has ceased to be guided " upon those considerations which ordinarily regulate the conduct of human affairs," and would, consequently, appear not to be liable. In the second place, the man who uses the public highway does so at his peril ; *i.e.*, he must take the risk of sustaining damage from causes which are included under the term " inevitable accident."

As Baron Bramwell said in *Holmes v. Mather* (c), " For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid." For example, if A.'s horse shy, through no negligence of A.'s, and mount the footpath and kick B., B. has no cause of action against A., inasmuch as B.'s injury

(a) (1891) 1. Q.B. 86. (b) 14 Allen (Mass) 290.
(c) L.R. 10 Ex. p. 261.

is a result of his taking that risk to which all users of the highway are subject.

Similarly, where B.'s dress is splashed with mud by a passing motor car to such an extent that the dress cannot be worn again, neither the driver nor the owner of the car can be made liable, inasmuch as the damage resulted from the risk attendant upon the ordinary use of the public way.

From the foregoing considerations it would appear that a lunatic may not be liable for damage caused by his inability, through no immediate fault of his own, to act in a rational way. In certain cases of insanity the lunatic is no more nor less than an automaton and, as such, would be unaffected by those mental considerations to which the law requires a man to pay heed at his peril. It is concluded, therefore, that a lunatic of this or of a similar type would not be held answerable for those acts or omissions which in a normal person would amount to actionable negligence.

The general purpose of the law of Tort is to secure to a man indemnity against certain forms of harm to person, reputation, or estate, not because they are *mala in se*, but because they are injuries to the person concerned. On the other hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbours, unless a clear and manifest incapacity is shown: nevertheless, the law does not, in general, hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger; or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did. Any legal standard fixed for the purpose of determining liability in cases of tort must, in theory, be one which would apply in similar circumstances to all men not specially excepted. In practice,

no doubt, one man may have to pay damages, while another may escape, according to the different feelings of different juries : but all that this demonstrates is that the law does not perfectly accomplish its ends because human intelligence is not perfect.

These principles are well illustrated in the case of contributory negligence. Now the law admits of exceptions to the rule that every man is presumed to possess ordinary capacity not only to avoid doing harm to his neighbours but also to avoid being harmed by his neighbours ; so that when a man has a distinct defect of such a nature that all can recognise it as making certain precautions impossible, he will not be held answerable for not taking them ; that is to say, the law recognises that people suffering from lameness, blindness, or deafness cannot exercise that care which an ordinary person would take with a view to the avoidance of threatened injury arising out of another's negligence. Thus, a lame man would not be precluded from obtaining damages in respect of injuries received, if, owing to his disability, he was unable to avoid being knocked down by a motor car which had got out of control.

Similarly, a blind man proceeding along the footpath would not be guilty of contributory negligence if he failed, through his infirmity, to avoid a collision with a cart which had been backed on to the pavement (a).

It is clear then that a blind man is not required to see at his peril. He is, no doubt, bound to consider his infirmity in regulating his actions, yet, if he properly find himself in a certain situation, the neglect to take precautions requiring eyesight would not prevent him from recovering damages in respect of an injury to himself, and, presumably, would not make him liable for injuring another person, so long as he was not culpably negligent by omitting to take

(a) Pollock on Torts, p. 469, Holmes on the Common Law, pp. 107 *et seq.*

such precautions as even a blind man may reasonably be expected to take. On the same principle, a deaf man is not required to hear at his peril, although he may suffer damage through his defect (a).

The general rule relating to contributory negligence may be stated thus :—Where a person sustains an injury in circumstances where he could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequences of the defendant's negligence, he cannot recover because he has been guilty of contributory negligence. In other words, the rule is not that *any* negligence on the part of the plaintiff will preclude him from recovering damages ; but that, although there have been negligence on the part of the plaintiff, he may, nevertheless, recover damages, unless he could by ordinary care have avoided the consequence of the defendant's negligence. Thus, where a man had improperly left an ass on the highway, he was held entitled to recover against one who negligently drove against it (b).

According to Lord Blackburn, " If the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequences of the defendant's negligence, he cannot recover " (c).

In *Radley v. L. & N. W. Railway Company* (d) Lord Penzance said, " Though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

It is important to note—especially for the purpose of this treatise—that this rule does not apply to

(a) *Skelton v. L. & N. W. Rly. Co.* (1867), 1 L.R. 2 C.P. 631.
(b) *Davies v. Mann*, 10 M. & W. 546.
(c) *Dublin, Wicklow & Wexford Rly. Co. v. Slattery*, 3 App. Ca. at p. 1207.
(d) (1876) 1 App. Ca. at p. 759.

children of tender years, as is shown by the following cases :—

(i) Where a man carelessly left his horse and cart unattended in the street, and a young child climbed into the cart and had a severe fall—the horse being led forward by a boy—the owner was held responsible, apparently on the ground that, having thrown temptation in the child's way, he could not be allowed to object that the child had yielded to it (a).

(ii) Where a young child climbed a defective fence which abutted on a highway and was injured by its falling upon him, the owner was held liable (b).

(iii) Where a child of tender years was injured through playing on a heap of paving-stones on the defendants' premises, it was held that the defendants were not liable for negligence, because there was neither allurement, nor trap, nor invitation, nor dangerous animal or thing. (*Cooke v. Midland G. W. Railway of Ireland* distinguished) (c).

In the cases cited there seems to be no doubt that if the defendant had been under any duty to the plaintiff the latter would have neen entitled to recover damages.

The *ratio decidendi* in these cases would seem to be the *absence* in the mind of the child of that mental capacity the *presence* of which would make a person of full age, in similar circumstances, guilty of contributory negligence.

The law appears to require that, in cases where he is the plaintiff, an infant of tender years is bound to take only those precautions of which such an infant

(a) *Lynch v. Nurdin*, 1 Q.B. 29.
(b) *Harold v. Watney* (1898) 2 Q.B. 320.
(c) *Latham v. R. Johnson & Nephew Ltd.* (1913) 1. K.B. 398.

is capable. The same principle may properly be applied in cases where he is the defendant. In other words, an infant is liable only in cases where he is old enough or intelligent enough to know better than to do the acts complained of.

It would appear to follow, therefore, that where a lunatic sustained injury through his inability to exercise the care and skill required by the general rule of the law, and thus directly contributed to the injury, he would not be precluded from recovering compensation any more than a child of tender years would be in similar circumstances, the duty to exercise proper care lying upon the person through whose negligence in the first instance the plaintiff suffers damage.

Inasmuch as the law has recognised exceptions to the general rule operative in cases of tort, it is instructive to make a comparison between the capacity of a corporation and that of a lunatic to commit a tort.

A corporation aggregate has no personality, has no mind or will, and therefore can act only through its agents. Upon the principles embodied in the maxims *respondeat superior* and *qui facit per alium facit per se*, it has been decided that a corporation may be held liable for trespass (a), for trover (b), and for libel (c). There seems to have been some difficulty in determining whether a corporation could be held liable for torts which involve malice: it was held, however, in *Citizens' Life Assurance Co. v. Brown* (d) that a corporation would not be held to be incapable of malice so as to be relieved of liability for malicious libel in respect of a statement published by one of its servants acting in the course of his employment. In

(a) *Maund v. Monmouthshire Canal Co.*, 4 Man & G. 452.
(b) *Yarborough v. Bank of England*, 16 East 6.
(c) *Whitfield v. S.E. Rly. Co.*, E.B. & E. 115.
(d) (1904) A.C. 423.

the words of Lord Lindley, when delivering judgment in the Judicial Committee of the Privy Council (a), "If it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.*, as principals acting by agents and servants, it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases in questions arising out of contract and in questions arising out of torts and frauds, and to apply them to one class of libels and to deny their application to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their lordships to be contrary to sound legal principles."

A lunatic, on the other hand, cannot, during the continuance of his insanity, effectively appoint an agent (b). It would seem, therefore, that if it be shown that he is in an analogous position to that of a corporation (having no mind or will of his own) he cannot be held liable for his torts.

It is instructive also to compare the capacity of an infant to commit tort with that of a lunatic. The liability of an infant old enough to earn his living was considered in a case decided in 1794 where it was held that an action for money had and received would lie against an infant to recover money which he embezzled. Lord Kenyon stated, in delivering judgment, that infants were liable for actions *ex delicto* though not *ex contractu* (c).

In *Burnard v. Haggis* (d) where an infant who had hired a mare for riding caused her death by jumping her, it was held that the act of riding the mare into the place where she received her death-wound was

(a) *Citizens' Life Assurance Co. v. Brown* (*supra*) at p. 426.
(b) *Elliot v. Ince*, 7 De G.M. & G. 475.
(c) *Bristow v. Eastman*, 1 Esp. 172.
(d) 14 C.B.N.S. 52.

as much a trespass, notwithstanding the hiring for another purpose, as if, without hiring at all, the defendant had gone into a field and turned the mare out, and hunted her and killed her. It was a bare trespass not within the object and purpose of the hiring and was an absolute wrong on the part of the defendant for which he was unquestionably liable (a).

In the case of *In re Seager* (b) an infant employed by a butcher to collect sums of money due from his master's customers was held liable *ex delicto* to an action brought for the recovery of the money received. Kay, J. said that there was no doubt that the boy was liable (c).

In *Cowern v. Nield* (d) where the law as declared in *Bristow & Eastman* (e) was approved, it was held that, if the infant had obtained by fraud the money sought to be recovered, he could be required to return the money which he had fraudulently received.

In each of the cases mentioned above the infant had reached years of discretion : that is to say, he was of sufficient age to be employed by others although he was under legal disability by reason of his youth. In no case, however, has an infant of tender years been held responsible for tortious acts committed by him. The reason would seem to be that where an infant is lacking in mental development he is not answerable for his delictual acts. Two cases are cited below which show conclusively that infants of tender years are not precluded by the general rule of contributory negligence from recovering damages in respect of injuries sustained by them as a result of the negligence of the defendant.

While an infant not of tender years may be held responsible for his torts, an infant of tender years who has not reached an age when he can be expected

(a) *Burnard v. Haggis*, 14 C.B.N.S. per Erle, C.J. & Willis J. p. 53.
(b) 60 L.T. 665.
(c) 60 L.T. at p. 665.
(d) (1912) 2 K.B. 419.
(e) *Supra*.

to exercise caution in avoiding physical danger is not prevented from recovering damages in respect of injury sustained by him through the negligence of others, although he himself may have been guilty of acts or omissions which in the case of an adult would amount to contributory negligence. (*Cooke v. Midland G. W. Railway of Ireland* (a). *Latham v. R. Johnson & Nephew, Ltd.* (b).)

The absence of cases to the point would seem to show that, just as an infant of tender years is not responsible for contributory negligence, so is he not responsible for actionable negligence and for other torts.

By analogy, a lunatic whose mind is proved to be in a state similar to that of an infant of tender years, would seem not to be responsible for his torts.

It appears that Austin took a similar view to that stated above, for, in his Twenty-sixth Lecture, when dealing with certain aspects of the maxim *ignorantia juris neminem excusat*, he says that an infant or an insane person is exempted from liability not because he is an infant or because he is insane, but because it is inferred from his infancy or insanity that the alleged wrong was not the consequence of unlawful intention or inadvertence. "It is *inferred*," he says, "from his infancy or insanity, that, at the time of the alleged wrong, he was ignorant of the law: or (what in effect is the same thing) was unable to remember the law, or (assuming that he had known, and was able to remember the law) it is inferred that he was unable to apply the law and to govern his conduct accordingly; that he did not and could not foresee the consequences of his conduct; and, therefore, did not and could not foresee that his conduct tended to the consequences which it was the end of the law to avert. For, in order that I may adjust my conduct to the command or pro-

(a) (1909) A.C. 229. (b) (1913) 1 K.B. 398.

hibition of the law, I must know and remember what the law *is*; I must distinctly apprehend the *nature* of the conduct which I contemplate; and (in the language of lawyers and logicians) I must correctly *subsume* the specific case *as falling within the law*. In other words, I must compare the conduct which I contemplate with the purpose or end of the law and must be able to perceive that it agrees or conflicts with that purpose or end. Unless I am competent in this intellectual process, the sanction cannot operate as a motive to the fulfilment of the obligation, or (changing the expression) the obligation is necessarily ineffectual. Every application of the law to a fact or case is a syllogism of which the minor premiss and the conclusion are singular propositions" (a).

Bracton's view is expressed in the following words: —"In multis ad paria judicantur minor et furiosus vel multum non differunt, quia ratione carent" (b).

Bentham also seems to have regarded a lunatic as exempt from liability for his torts on the ground that the prospect of the evils held forth by the law "cannot have the effect of influencing the conduct of the party" (c).

Sir William Blackstone's view of the liability of lunatics for their torts was that inasmuch as a wrong is the effect of a "vicious will" (by which, Austin says, he means "unlawful intention or culpable negligence"), infants and madmen are exempted because the act goes not with their will (d).

The Roman Law excepted *furiosi* from liability for delicts on the ground that a lunatic has no mind: that is to say, he was presumed to be incapable of *intending* to do harm to his neighbours (e).

(a) Lectures on Jurisprudence XXVI.
(b) De exceptionibus, cap, XXIX. S. 3.
(c) Principles of Morals & Legislation, ch. VI. Section 23, ch. XIII., Section 9.
(d) Blackstone Comm., IV. 20–24.
(e) D.50, 17, 111 pr.; D.47, 10, 3, 1.

By the *Roman Dutch Law* any person is answerable for his wrongful acts *if he had intelligence to understand that he was doing wrong*. "This" says Mr. R. W. Lee "excludes lunatics and young children" (a).

American Law. While the American authorities are agreed that persons *non compos* (as well as children without discretion) are not responsible for their torts where intention is a necessary element of liability, they state that infants and lunatics, without regard to their degree of incapacity, are liable, in a civil action, for the damage caused by such torts of theirs as would in sane adults amount to a tort of either wilful wrong or culpable negligence. This liability is said to rest according to Messrs. Shearman & Redfield (b) not upon the usual principle of personal fault (for there may be none) but upon the broad ground that where one of two innocent persons must bear a loss, he must bear it whose act caused it. In this statement lies an explanation of the difference between the American Law and English Law as to a lunatic's responsibility for his torts.

Whatever may be said as to the equity of the American rule, it is contrary to principle and there is no authority for it apart from the case of *Williams v. Hays* (c) which has been considered above in the section on Trespass.

Sir Frederick Pollock says (d) that liability in such a case can be imposed only upon the obsolete theory that inevitable accident is no excuse. The same learned author (e) examines the cases relating to this matter and shows that the theory referred to upon which alone liability of lunatics for their torts can rest is now obsolete and that the abandonment of

(a) Introduction to Roman Dutch Law, p. 279.
(b) Law of Negligence, 6th Ed., p. 314.
(c) *Supra.*
(d) Law of Tort, p. 56.
(e) *Ibid.*, pp. 138–151.

the theory is now recognised by the Common Law of England.

Sir John Salmond, K.C., says (a) that there is no adequate English authority as to the liability of lunatics for torts committed by them. The learned author is hardly consistent when he states that inevitable mistake of fact due to unsoundness of mind is no defence to wrongs of *wilful* interference with the person, property, reputation, or other rights of other persons, such as trespass, assault, conversion, or defamation, inasmuch as he proceeds to state that, if the lunacy of the defendant is of so extreme a type as to preclude any genuine intention to do the act complained of, there is no voluntary act at all, and, therefore, no liability. The latter statement, it is submitted, is precisely in accordance with the Common Law of England which does not make a man responsible for acts done where the state of his mind precludes the operation of those forces which in normal circumstances regulate a man's conduct. Both Sir Frederick Pollock and Sir John Salmond suggest that the Common Law would not hold a man responsible for mischief done by him while in an epileptic fit, or by a somnabulist in his sleep, or by a fever patient in his delirium.

From the foregoing considerations it is submitted that the Common Law of England regards a lunatic generally as being incapable of committing a tort, but that, where it can be shown to the satisfaction of the Court that the particular nature of the insanity did not preclude him from understanding the nature and probable consequences of the particular act complained of, he will be liable for his torts just as an ordinary person is liable, *i.e.*, on the ground that he intended the natural and probable consequence of his acts.

In the words of Mr. Justice Holmes, "There is no

(a) Law of Torts, p. 61.

doubt that in many cases a man may be insane and yet perfectly capable of taking the precautions and of being influenced by the motives which the circumstances demand. But if insanity of a pronounced type exist, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse" (a).

(a) Common Law, p. 109.

CHAPTER III

MENTAL DEFICIENCY AND THE LAW OF CONTRACT

PART I.—GENERALLY.

IN order that investigation may be made in a logical and scientific manner into the question whether a lunatic may or may not be capable, in the eye of the law, of entering into a contract, it has been deemed convenient, as a necessary preliminary, to set out shortly certain of the leading principles of the English law of contract.

In innumerable legal decisions and in the works of the great text-writers it has been asserted that the general theory of English law in regard to acts done and contracts made by parties which affect their rights and interests, is that in all cases, there must be a free and full consent in order to bind the parties. The existence of a free and full consent is insisted upon: moreover, the consent must be an act of reason accompanied by due deliberation, the mind weighing, as in a balance, the good and evil on each side (a). It has been observed by a celebrated jurist (b) that every true consent implies three things —first, a physical power; secondly, a moral power; and thirdly, a serious and free use of both powers. In dealing with perfect obligations Grotius says:— "*Quod autem fit animo non deliberato id nos quoque ad vim obligandi non credimus pertinere*" (c).

(a) Story Eq. 222.
(b) Puffend, De J. N. et G. bk. 3, c.6. S.3. Barbeyrac's note 1.
(c) De Jur. Bell. et Pac, Lib II. cap. XI. Sec. V.

Pothier says :—" A contract is a particular kind of agreement and an agreement is the consent of two or more persons to form some engagement, or to rescind or to modify an engagement already made, *Duorum vel plurium in idem placitum consensus* (a). The essence of contract consists in consent : it follows, therefore, that a person must be capable of giving his consent and, consequently, must have the use of his reason in order to be able to contract.

In Austin's notes of his undelivered lectures he says that the consent of the parties is of the essence of a contract (b).

According to Sir Frederick Pollock, an agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or foreborne by some or one of those persons for the use of the others or other of them (c). This statement was adopted by Kekewich, J., in *Foster v. Wheeler* where he said :—" The first and most essential element of an agreement is the consent of the parties. There must be the meeting of two minds in one and the same intention . . . It must be the intention of the parties that the matter in hand shall, if necessary, be dealt with by a Court of Justice. The common intention of the parties to an agreement is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence " (d).

Sir John Salmond (e) says that " a contract is a bilateral act in the law which involves the consenting wills of two or more distinct parties : in other words, a contract is an agreement which creates rights *in personam* by way of consent. No agreement is a contract unless its effect is to bind the parties by the

(a) Pothier on Obligations p. 3.
(b) John Austin's Jurisprudence—Appendix.
(c) Principles of Contract, 10th Ed. pp. 2–5.
(d) 36 Ch. D. 695.
(e) Jurisprudence, Ch. XVI.

vinculum juris of a newly created personal right. It commonly takes the form of a promise or set of promises. That is to say, a declaration of the consenting wills of two persons that one of them shall henceforth be under an obligation to the other naturally assumes the form of an undertaking by the one with the other to fulfil the obligation so created. . . A valid agreement is one which is fully operative in accordance with the intent of the parties. Where there is no real consent there is no real agreement. In order that consent may be justly allowed as a title of right, it must be free."

Savigny's definition is as follows :—" Une convention est l'accord de plusieurs parties qui determinent par une manifestation de volonté commune leur relations juridiques " (a).

M. Ahrens defines contract as " le consentement exprimé de plusieurs personnes a l'effet de créer entre elles un rapport obligatoire sur un objet de droit " (b).

Holland says that an obligatory contract is the union of two or more parties in an accordant expression of will, with the object of creating an obligation between them (c). The same writer says that a lunatic can perform no juristic act because he has no capacity for willing ; and that lunatics, though capable of holding property, are, strictly speaking, incapable of any legal act (d).

Grotius says :—" No promise is binding unless the person who made it has liberty to choose for himself, and understanding to direct him in his choice. Without these faculties of liberty and understanding he is no moral agent, or is not capable of doing an act so as to produce any moral effect by it. Upon this account the promises of infants, idiots and madmen

(a) Le Droit des Obligations, vol. 2. p. 142.
(b) Cours ii. p. 226.
(c) Jurisprudence, pp. 173–4.
(d) *Ibid.*, pp. 72 and 235.

are not binding: such persons are not moral agents and are therefore unable to do any valid act."

Grotius adds that the use of reason is the first requisite to constitute the obligation, or *vinculum juris*, of a promise, which a lunatic, idiot, and an infant are consequently incapable of making: "*Primum requiritur usus rationis; ideo et furiosi et amentis et infantis nulla est promissio.*" (a).

A typical example of the conflicting statements made by the text-writers is to be found in the fact that the learned author of Leake on Contract (b) says, without qualification, that a person may be mentally afflicted to such a degree as to be incapable of understanding an agreement, and, consequently, incapable of binding himself by contract. He refers as his authorities to *Ball v. Mannim* (c), *Blackford v. Christian* (d) and to *Jenkins v. Morris* (e). On the same page he quotes the decision in the *Imperial Loan Co. v. Stone* (f) which is an important qualification of his first statement. (In *Ball v. Mannim* the House of Lords approved the declaration of the judge in the Court below that both of the parties to a valid contract must be capable of understanding and acting in the ordinary affairs of life).

Now, as stated above, a contract is a voluntary agreement which will be recognised and enforced by law and, in order to create an agreement, there must be consent of parties—such consent may be either expressed or implied from conduct. In other words, there must be *duorum pluriumve in idem placitum consensus*. Moreover, the two essential elements in consent are that it must be free and it must be intelligent. Consent cannot be obtained where one of the parties is without an intelligent mind; therefore in strict theory a lunatic cannot give consent; and,

(a) De Jure Belli et Pacis. Lib. II. cap. XI. Sec. V.
(b) 6th Ed. p. 415. (c) 3 Bli. N. S. 1.
(d) 1 Knapp. P.C. 73. (e) Infra.
(f) Infra.

consequently, he cannot enter into a contract. This conclusion is precisely the deduction expressed by the maxims of the Roman Law cited below. That the jurists applied the deduction logically and consistently is made clear by Sohm, who states :—" By Roman law a lunatic cannot even buy a loaf for himself, though he have money to pay for it " (a). That is to say, no obligation would be created.

In the case of a lunatic, however, it is manifest that it may happen that the intellectual faculties are so obscured and the judgment so disordered that the agreement, which is the foundation of the contract, cannot have taken place and, there being no contract, there will be no primary obligation and therefore no liability to a secondary one. In the Institutes of Justinian (b) it is declared that " *Furiosus nullum negotium gerere potest, quia non intelligit quod agit.*" Bracton and the author of Fleta use similar language in their works when dealing with this subject. Thus, for example, Bracton writes " *Furiosus autem stipulari non potest, nec aliquod negotium gerere, quia non intelligit quod agit* " (c).

The law as stated by Bracton and by the author of Fleta was approved by the Court of Appeal as recently as in 1890 in the case of *re Rhodes, Rhodes v. Rhodes* (d) where it was stated that there cannot be a contract by a lunatic. While it is true that in this case the question for the decision of the Court was whether or not a lunatic could in certain circumstances be said to have entered into an *implied* contract, it is interesting to note that in the opinion of the learned judges of the Court of Appeal a lunatic was incompetent to make an express contract, much less an implied contract. The Court considered that to use the term " *implied contract* " in respect of a lunatic was unfortunate and that it would be more con-

(a) Instes. Section 45.
(b) Book 3. Tit. 19. S. 8.
(c) Bract. bk. 3, c. 2, s. 8.
(d) 44 Ch. D. 94.

sistent with the principles of jurisprudence to state that the circumstances which in the case of a normal person would give rise to an *implied contract* would, in the case of a lunatic, give rise to an implied *obligation*.

In conformity with the above-mentioned principles, the positive laws of many countries have declared to be invalid the contracts and voluntary acts (*e.g.*, conveyances) of idiots, lunatics and other persons of unsound mind. In fact, speaking generally, the law of most civilised countries treats lunatics as wholly irresponsible for their actions. In such countries a lunatic is not chargeable at law for acts done by him. He cannot commit a crime or a tort: he cannot marry, or make a will, or bind himself by contract, or be a witness, or bring an action. *Quoad haec omnia* he is regarded as standing precisely on the same level as a child below the years of discretion (a).

The following paragraphs showing the position in other legal systems of a lunatic so far as regards capacity in contract have been inserted by way of commentary on the old English doctrine of total incapacity, consideration of which follows in the next section.

The Roman Law was quite clear and consistent upon the matters referred to. It always treated the ordinary lunatic as being practically in the same position as the *infans pupillus*. The general maxims were *furor nulla voluntas est* (b) and *furiosus nullum negotium gerere potest, quia non intelligit quod agit* (c).

(a) These statements do not apply to acts done by a lunatic during what is termed a "lucid interval" (*quo furor intermissus est*), for during a lucid interval—which is always a question of fact—there is no insanity at all: in fact, the person in question is sane for the time being.

(b) Dig. L. 17 fr. 40.

(c) Gaius Com. III. Sec. 106. Just. I. iii, 19 Sec. 8; Dig. Bk. 12, Sec. 1. Sub-sec. 12; Bk. XXVII, Sec. 10,. Sub-sec. 10. Bk. XLIV, Sec. 7. Sub-secs L 24–46; Bk. L, Sec. 17, Sub-secs 5–40; 2 Voet on the Pandects, Bk. 27,. tit. 10, Sub-sec. 3; Cujacius, Ed. 1618. Vol. III. p. 907, on Digest XLIV., 7, 46; Hunter's Roman Law. 4th Ed., p. 606; Sohm, Inst. Roman Law, p. 140, S. 44, p. 228; Salkowski, Roman Private Law, p. 296.

He had less capacity even than a pupil above *infantia*, because while the latter could with *auctoritas* of his tutor enter into any lawful contract and could, even without it, be bound by one which was of benefit to him, all contracts alleged to have been entered into personally by a *furiosus* were totally null and void.

The uncertain duration of mental incapacity led the Romans to appoint a curator—not a tutor—to be the guardian of the lunatic. The curator was intended to supply that which the lunatic lacked, *viz.*, civil capacity.

Similarly, under the law of Scotland (following the Roman Law), persons in a state of "furiosity" or of "idiocy" are declared to be incapable of, and not to be bound by, any legal act. Thus, Lord Stair in his Institutions (a) says:—"Neither infants, nor idiots, nor furious persons, except in their lucid intervals, can contract."

The German Code, which follows closely the Roman Law, places lunatics and infants exactly on the same footing. The relevant paragraphs are as follows:—

104. Geschäftsunfähig ist

(i) Wer nicht das siebente Lebensjahr vollendet hat;

(ii) Wer sich in einem die freie Willensbestimmung ausschliessenden Zustande krankhafter Störung der Geistesthätigkeit befindet, sofern nicht der Zustand seiner Natur nach ein vorübergehender ist;

(iii) Wer wegen Geisteskränkeit entmündigt ist;

105. Die Willenserklärung eines Geschäftsunfähigen ist nichtig.

(a) 1-10-13.

The law of British India is contained in the Indian Contract Act, 1872, Sections 11 and 12 of which declare that contracts made by insane or intoxicated persons are void.

The following statement of American Law appears in a leading American work (a) :—

" They who have no mind ' cannot agree in mind ' with another ; and, as this is the essence of a contract, they cannot enter into a contract. Mere mental weakness or inferiority of intellect will not incapacitate a person from making a valid contract . . . . There must be such a condition of insanity or idiocy as, from its character or intensity, disables him from understanding the nature and effect of his acts and therefore disqualifies him from transacting business and managing his property : and an adult person, although of unsound mind, can become liable on an implied contract for necessaries."

If the condition of lunacy be established by proper evidence under proper process, the representatives and guardians of the lunatic may avoid a contract entered into by him at a time when he is thus found to have been a lunatic, although he seemed to have his senses, and the party dealing with him did not know him to be of unsound mind. But this rule has one important qualification quite analogous to that which prevails in the case of an infant and resting undoubtedly on a similar regard for the interests of the lunatic. This is, that his contract cannot be avoided, if made *bona fide* on the part of the other party, and for the procurement of necessaries, which, as in the case of infants, would not be restricted to absolute necessaries, but would include such things as are useful to him and proper for his means and station in life.

The finding, by a competent court, of the fact of lunacy and the appointment of a guardian are held

(a) Parsons' Law of Contracts, 9th Ed.

to be conclusive proof of such lunacy, and all subsequent contracts are void.

In a recent American case (a) where a mortgage made by a lunatic during the insanity was set aside, the Court observed that it is not material that in taking the deed the grantee acted in good faith, and without knowledge of the grantor's insanity, because he who deals with an insane person, as with an infant, does so at his peril.

While the American law protects both infants and lunatics without regard to the other party's knowledge or want of knowledge of the infancy or of the insanity, it imposes a *quasi* contractual duty upon infants and lunatics to compensate for necessaries supplied to them.

By the *Austrian* Civil Code, whoever has not the use of his reason . . . . is incapable of making or accepting a promise. (Art. 865). Whoever demands the annulment of a contract for the want of consent must return everything he has received to his advantage in consequence of such a contract (Article 877).

By the *Chilian* Civil Code, persons of unsound mind are absolutely incapable of contracting. (Article 1447).

According to *French* Law (*Code Napoléon*) among those persons who are declared to be incapable of contracting are interdicted persons, *i.e.*, persons of full age who are in an habitual state of imbecility, or of insanity—even where subject to lucid intervals—in respect of whom an order for interdiction has been made.

The *Roman-Dutch* Law, while denying the capacity of an insane person to bind himself by contract, recognises the equity of allowing a person who has, in good faith, expended money on behalf of a lunatic to have his expenses recouped. In *Molyneux v. Natal Land & Colonisation Co.* (b) it was held by the

(a) *Brigham v. Fayerweather.* 144 Mass. 88.
(b) [1905] A.C. 555.

Judicial Committee of the Privy Council that a contract made by an insane person is void and not merely voidable, quite apart from the fact that the other party did or did not know of the existence of the insanity.

In the middle ages—in the days of the trade guilds—when English commerce was in its infancy, the acceptance of the plain doctrine of total incapacity enunciated on p. 65 above did not affect the convenience of traders; but when commerce began to develop upon broad lines, it was felt that a strict application of the doctrine would operate unfairly, inasmuch as it might lead to practices which, if unhindered, would prove inimical not only to the maintenance of justice, but also to the development of trading and of commerce. The objections to the old doctrine—which recognised no difference between one lunatic and another—were said to be obvious to the observer of human nature and to fall under four heads, *viz* :—(1) the insecurity of enjoyment; (2) the encouragement of fraud; (3) the restraint of trade; and (4) the restraint upon alienation.

The old doctrine of total incapacity was first attacked by an application of the ancient rule of procedure that no man may stultify himself by pleading his own incapacity. It would appear, however, that the old rule was not assailed until the reign of Edward III; for Britton (who wrote in the reign of Edward I) asserts that *dum fuit non compos mentis* was at that time a sufficient plea to avoid a man's own bond (a). There is also a writ in the Register from which it is clear that it was possible for the alienor to recover lands aliened by him during his insanity (b).

While it is true that the authority of the rule was questioned in the third year of the reign of Edward III, this attempt to modify it was apparently unsuc-

(a) Britt. f. 66. (b) Fol. 228.

cessful, for Fitzherbert several years later (Circ. 1534) states definitely that the writ of "*Dum fuit non compos mentis*" lies for the man who has aliened his land in fee simple, fee tail, for life or for years while he was of unsound mind (a). It is interesting to note, however, that in the reign of Elizabeth it was held certainly upon two occasions, once in an action of debt due upon a bond (*Stroud v. Marshall* (b)), and once in an action against an innkeeper for the loss of his guest's goods (*Cross v. Andrews*) (c), that the plea that a man may not stultify himself by pleading his own incapacity was bad, and that Fitzherbert's statement was not law.

Sir Edward Coke quotes Littleton (d) and the Year Books (e) as his authorities for the statement that the law did not allow a man to stultify himself by pleading his own incapacity in order to avoid his acts on the ground of his being *non compos mentis*. In *Beverley's case* (f) the Court accepted Coke's statement of the law as correct, and, on this authority, refused to allow a man to avoid an act which he had performed during his insanity. In other words, the effect of the decision in *Beverley's case* was to make a lunatic absolutely liable for his alleged contracts. The fact that he was or was not so insane as not to be able to understand the nature of his act does not appear to have been considered by the Court which merely applied the curious rule of procedure that a man could not stultify himself by pleading his own insanity.

In *Beverley's case* the Court seems to have been so convinced of the existence of reliable authority for its judgment that a resolution was passed deciding also that there should not be any relief in equity. It may be observed, however, that the veto of the Common

(a) Nat. Brev. 202. (b) Cro. Eliz. 398.
(c) Cro. Eliz. 622. (d) Litt., lib. 2 cap. Descents, fol. 95.
(e) 39 Hen. VI. 42 b. 5 Ed. III., 70. (f) 4 Rep. 123b.

Law judges was disregarded by the Court of Chancery.

There appears to have been a tendency on the part of the Common Law judges of the first half of the nineteeneth century to follow the rule approved in *Beverley's case* whenever it seemed equitable to do so; but, on the other hand, they did not hesitate to ignore the rule whenever a strict application of it would have been contrary to the principles of natural justice (a).

How conflicting were the authorities as to the liability of lunatics for their acts is well illustrated by reference to the decision in *Thompson v. Leach* (1690) (b) where it was held that the deed of a lunatic was void on the ground that "lunatics, like infants, know not how to govern themselves," the Court having declared that "the cases of lunatics and infants go hand-in-hand" and that "it is incongruous to say that acts done by persons of no discretion shall be good and valid in the law." On the other hand, Lord St. Leonards stated in 1845 that, in his opinion, it was incontrovertibly established that the party himself could not, after he had recovered his senses, plead his lunacy in avoidance of the deed (c).

According to the text-writers, however, a survey of the relevant decided cases reveals the fact that the universal authority of the doctrine that the contract of a lunatic is void has been gradually modified without being expressly overruled (d) and that the rule that no man could stultify himself by pleading his own incapacity has been modified to such an extent that, in the year 1849, it was held in the case of *Molton v Camroux* (e) and confirmed on appeal (f) that unsoundness of mind is a good defence to an action upon a contract, provided that due proof can be given that the defendant lacked capacity to contract and that the plaintiff either knew it or would have

(a) *Yates v. Brown*, 2 Str. 1104. (b) 3 Mod. Rep. 301.
(c) 2 Sugden, Powers, p. 179. (d) See Pope on Lunacy, Book II. Ch. 1.
(e) 2 Exch. 487. (f) 4 Exch. 17.

known it if he had exercised ordinary care and observation.

It should be observed also that before the decision in *Molton v. Camroux*, (a) the rule in *Beverley's case* (b) had been subjected to hostile attacks by several eminent authorities. For instance, Fonblanque in his book on Equity states that to adhere to the rule that a man may not plead his own incapacity is in defiance of natural justice and of the universal practice of the civilised world (c).

Again, in the case of *Thompson v. Leach* (d) it was observed by Lord Holt that it was unaccountable that a man should not be able to excuse himself by the visitation of heaven, when he might plead duress from man to void his own act; Sir W. Evans states that nothing could be more absurd than this maxim (e); while Mr. Justice Story expresses his disagreement with it in the following terms :—" how so absurd and mischievous a maxim could have found its way into any system of jurisprudence professing to act upon civilised beings is a matter for wonder and humiliation (f)."

In America the doctrine has been repudiated as being contrary to reason and to justice : the American authorities sustain the principle that lunacy nullifies a contract and that insanity may be either specially pleaded or given in evidence under the general issue (g).

Although it may have seemed contrary to justice for it to be a rule that a lunatic was bound by his contracts, inasmuch as he could not plead his own incapacity, it has, nevertheless, been defended by some English text-writers on the ground that the

(a) Supra.
(b) Supra.
(c) Fonbl. Eq. Bk. 1 C. 2. S. 1.
(d) 3 Mod. 301.
(e) 2 Poth. on oblig. Evans' note, App. 3. p. 25.
(f) 1 Story Eq. Jur. 236.
(g) *Mitchell v. Kingham*, 5 Pick. 431; *Grant v. Thompson*, 4 Conn. 203.

rule worked well in practice, as it protected *bona fide* purchasers and sellers, and imported an element of certainty into the matter, which fact was considered to be of much utility.

The old rule having been disposed of, the way is now open for consideration to be given to the modern rule.

The Modern Rule.

The modern rule as to a lunatic's capacity to enter into contracts rests to a large extent, but not entirely, upon the case of *Molton v. Camroux* (a), where an action was brought by the administrators of an intestate lunatic to recover the money paid by the deceased to an assurance society in respect of two annuities which were determinable with his life. It was proved that the intestate was of unsound mind at the date of the purchase, but that the transactions were fair and in the ordinary course of business, and that the insanity was not known to the society. It was held that the money could not be recovered. Upon subsequent appeal to the Exchequer Chamber the rule was laid down in the following terms :—

" The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original positions " (b).

Whether or not this rule is, in fact, supported by authority and by principle it is the object of this chapter to determine.

According to the decisions in several old cases, every person dealing with a lunatic, with knowledge of his incapacity, is deemed to perpetrate upon him a fraud which avoids the contract (c). In the exist-

(a) Supra. (b) 4 Excb. 17

(c) *Wright v. Proud*, 13 Ves. 136 ; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

ence of this legal presumption probably lies an explanation of the insistence by the Courts upon proof of the other party's knowledge of the alleged lunacy.

Any doubt which may have existed relative to the present law as to the position of a person who, having recovered from his lunacy, seeks to avoid a contract entered into by him while he was of unsound mind is said to have been removed by the decision of the Court of Appeal in *The Imperial Loan Co. v. Stone* (a). In this case a promissory note had been signed by a lunatic as surety, and the statement of defence to an action in which the lunatic was sued alleged that the defendant when he signed the note was so insane as to be incapable of understanding what he was doing, and that the insanity of the defendant was known to the plaintiffs. In the Court below the jury were unable to agree as to whether or not the plaintiffs were cognisant of the lunacy of the defendant, but, notwithstanding this, the judge ordered judgment to be entered for the defendant. The Court of Appeal ordered a new trial on the ground that, on the authority of *Molton v. Camroux* (b), in every case where in an action of contract the defence is set up that the defendant was insane when the contract was made, it is necessary, in order to succeed in this defence, to show that, *at the time of the contract*, such insanity was known to the plaintiff.

In the judgments delivered in the Court of Appeal by Lord Esher, M.R., and by Fry, L.J., many old cases and authorities were reviewed, and it was stated that there had been grafted upon the old rule, (*viz.*, that a man could not stultify himself by pleading his own incapacity), the exception that the contracts of a person who is *non compos mentis* may be avoided when his condition can be shown to have been known to the plaintiff. The Master of the Rolls, in his judgment, declined to recognise that there existed

(a) (1892) 1 Q.B.D. 599. (b) Supra.

any difference in the law in cases of this sort between executed and executory contracts, and stated that any suggestion that there is a difference was not supported by the authorities.

The principles of the law of contract which must be applied in order to arrive at a satisfactory conclusion upon the question whether a lunatic possesses capacity to enter into a contract having been set out above, examination is now made of the authorities (*i.e.*, decided cases) upon which the decision in *The Imperial Loan Co. v. Stone* (a) is said to rest.

The Court of Appeal, in dealing with *The Imperial Loan Co. v. Stone*, relied entirely upon *Molton v. Camroux* (b), where the authorities relied upon were three cases, *viz.*:—*Dane v. Viscountess Kirkwall* (c), *Baxter v. Earl of Portsmouth* (d), and *Browne v. Joddrell* (e). Upon reference to the facts of these cases, it is evident that both *Baxter v. Earl of Portsmouth* (d) and *Dane v. Viscountess Kirkwall* (c) were contracts for necessaries, and that the decision in *Browne v. Joddrell* (e) was based upon that in *Baxter v. Earl of Portsmouth* (d).

It would appear, therefore, that the cases *Molton v. Camroux* (b) and *The Imperial Loan Co. v. Stone* (a) were wrongly decided, inasmuch as the facts of these cases differ fundamentally from those of the cases upon which the Court relied as authority for its decision. The facts of the cases referred to are as follows :—

Dane v. Viscountess Kirkwall (f).

In this case it was held that in order to constitute a defence to an action for use and occupation of a house (*i.e.*, a necessary) taken by the defendant under a written agreement at a stipulated sum per annum, it is not enough to show

(a) Supra. (b) Supra. (c) (1838) 8 C. & P. 679.
(d) Supra. (e) Infra. (f) Supra.

that the defendant was a lunatic and that the house was unnecessary for her, but it must be shown also that the plaintiff knew this and took advantage of the defendant's situation; and, if that be shown, the jury should find for the defendant; and they cannot, on these facts, find a verdict for the plaintiff for any sum smaller than that specified in the agreement. Patteson, J., says (a) "It is not sufficient that it be shown that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it." The rent was exorbitant and evidence was given of the knowledge of the plaintiff that the defendant was insane. Verdict was given for the defendant.

Baxter v. Earl of Portsmouth (b).

In this case a tradesman supplied a person with goods suited to his station in life and, afterwards, by an inquisition taken under a commission of lunacy, that person was found to have been lunatic before and at the time when the goods were ordered and supplied. It was held that this was not a sufficient defence to an action for the price of the goods, the tradesman at the time when he received the orders and supplied the articles not having any reason to suppose that the defendant was a lunatic.

Browne v. Joddrell (c).

This was an action on a contract for necessary work and labour and for goods sold and delivered. It was held by the Court of King's Bench that it is no defence that the defendant is of unsound mind unless the plaintiff knew of, or in any way took advantage of his incapacity, in order to

(a) 8 C. & P. at p. 685. (b) (1826) 5 B. & C. 170.
(c) (1827) 1 Moo. & M. 105.

impose upon him. Lord Tenterden, in delivering judgment in this case, relied entirely upon *Baxter v. Earl of Portsmouth* (a)—a case of necessaries—no other authority was cited.

Pollock, B., in *Molton v. Camroux* says that the Court in *Baxter v. Earl of Portsmouth* laid down the same rule as in *Browne v. Joddrell*, and that the explanation for the Court's doing this would seem to lie in the fact that both were cases of necessaries (b).

Other relevant cases which appear to have been ignored by the Court in *Molton v. Camroux* but were referred to by counsel for the defence were as follows :

Williams v. Wentworth (c).

This was a case where necessaries having been supplied to a lunatic, the Court held that the law will in such cases raise an "implied contract" against the lunatic or his estate. It appears from the judgment of the Master of the Rolls that the "implied contract" raised by the law is so raised because a lunatic is incapable of contracting. The following words of the Master of the Rolls show that the law supplies the capacity to contract which the lunatic lacks : —"A debt is constituted by reason of an obligation, which, in such cases, the law will impose" (d)

Howard v. Earl of Digby (e).

In this case the House of Lords held that a lunatic cannot bind himself by bond or by will : a lunatic cannot release a debt by specialty : neither can he be a cognizor in a statute merchant, staple, a judgment, warrant of attorney, or any other security. A clear distinction was drawn by the Lord Chancellor between cases of necessaries and other cases.

(a) Supra. (b) 2 Exch. p. 502. (c) (1842) 5 Beav. 325.
(d) 5 Beav. 329. (e) (1834) 2 Cl. & Fin. 634.

In *The Imperial Loan Co. v. Stone* (a) two cases were referred to where the Courts were required to determine whether the contract of a drunken person was void or voidable. It was held in *Matthews v. Baxter* (b) that the contract of a drunken person is voidable only, *i.e.*, that it is capable of ratification by the drunken person when he recovers his senses.

Inasmuch as in the opinion of Sir Frederick Pollock drunken men are, so far as regards their capacity to enter into valid contracts, on the same footing as lunatics (c), it is interesting to observe that in *Matthews v. Baxter*, the Court of Exchequer followed the decision in *Molton v. Camroux*. Now, as stated above, it was held in this case that the contract of a man too drunk to know what he is about is *voidable only*, and *not void*, and that such contract is therefore capable of ratification by him when he becomes sober. It was argued that the Court was bound by *Gore v. Gibson* (d) where a drunken man's contract was declared by the Exchequer to be "void altogether," but the Court declined to be bound by *Gore v. Gibson*, and held that the decision in *Molton v. Camroux* (e) constituted authority for the declaration that the contract of a drunken man who, at the time of the contract, was incapable of understanding what he was doing was voidable only, and (presumably) only so if the other party knew of the drunken man's condition.

In delivering judgment in *Matthews v. Baxter*, Pollock, C.B., said that the doctrine referred to appears to be in accordance with reason and justice. He stated also that in cases of necessaries supplied for the use of a person who is incapable of contracting the law itself will make a contract for the parties. The judgment of Parke, B., (which is similar to that

(a) Supra. (b) L.R. 8 Ex. 132.
(c) Law of Contract. 8th Ed. p.p. 54, 95.
(d) 13 M. & W. 623. (e) Supra.

of Pollock, C.B.) is expressed in the following words :—"Where the party when he enters into the contract is in such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether and he cannot be compelled to perform it. A person who takes an obligation from another in such circumstances is guilty of actual fraud. The modern decisions have qualified the old doctrine that a man shall not be allowed to allege his own lunacy or intoxication : and total drunkenness is now held to be a defence. *Yates v. Brown* (a) *Cole v. Robbins* " (b). In the judgment of Alderson, B., (which completed the unanimity of the Court) is expressed the opinion of that eminent Judge that the party's act in making the indorsement upon the bill was just the same as if the party had written his name upon the bill in his sleep, in a state of somnambulism.

Bramwell, L.J., was of the same opinion as Baron Alderson, for in *Drew v. Nunn* (c) he said :—"If a man become so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting."

It should be pointed out that in *The Imperial Loan Co. v. Stone* (d) the Court ignored altogether the principle laid down in *re Rhodes*, *Rhodes v. Rhodes* (e) *viz* :—that *even for necessaries* the liability of a lunatic was based *not upon contract at all*, but upon an obligation imposed by law analogous to those obligations which are raised in cases where infants have been sued for the cost of necessaries supplied to them.

It is remarkable that in *The Imperial Loan Co. v. Stone* the important case of *in re Rhodes*, *Rhodes v. Rhodes* was not considered and followed. A careful perusal of the report of this case shows that the Judge in the Court below and the Judges in the Court

(a) 2 Stra. 1104. (b) Bull N.P. 172. (c) 4 Q.B.D. at p. 669.
(d) Supra. (e) 44 Ch. D. 94.

of Appeal entertained no doubt that a lunatic could not enter into a contract, because "his consent would be a nullity" (a). The words of Lord Langdale, M.R., in *Williams v. Wentworth* (b) were quoted with approval. The Master of the Rolls said that in the case of necessaries the law supplies that which the lunatic lacks and that this rule rests upon a far better foundation than the rule that a man shall not be allowed to stultify himself. In the same case the following words of Mellish, L.J., in *re Gibson* (c) were referred to with approval:—"A lunatic cannot contract for his maintenance, so, whoever maintains him becomes a creditor by *implied* contract."

In the judgment of Cotton, L.J., in *re Rhodes*, *Rhodes v. Rhodes* (d) no doubt is left that it was the opinion of the Court that a lunatic could not himself contract in express terms. No qualification was made as to the other party's knowledge of the lunacy. Similarly, Lindley, L.J., said:—"In *re Weaver* (e) a doubt was expressed whether there is any obligation on the part of the lunatic to pay. I confess I cannot participate in that doubt. I think that that doubt has arisen from the unfortunate terminology of our law owing to which the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians '*obligationes quasi ex contractu*'" (f).

It appears to have been assumed that the rule that a lunatic cannot enter into a contract admitted of an exception in the case of necessaries: whereas, in fact, the law does not admit of an exception, but, in recognition of the fact that a lunatic himself cannot

(a) per Kay. J. 44 Ch. D. at p. 98.
(b) 5 Beav. 327.
(c) L. R. 7 Ch. 52.
(d) 44 Ch. D. at p. 105.
(e) 21 Ch. D. at p. 615.
(f) 44 Ch. D. p. 107.

enter into a contract, it will raise a *quasi* contract or obligation for him on one of two assumptions, *viz.*, (1) that, if the lunatic were in possession of his senses, he would be willing to pay the cost of necessaries supplied for his use; (2) that, inasmuch as only necessaries have been supplied to the lunatic, it is equitable that he or his estate should bear the cost thereof.

The *ratio decidendi* in the cases cited above appears to have been based on the mere fact that a lunatic is incapable of coming to that *consensus ad idem* without which no contract can be formed.

If this be the law as to *necessaries*, it applies with even greater force to contracts alleged to have been entered into by a lunatic for purposes other than the supply of necessaries. In other words, inasmuch as the law deems a lunatic incapable of contracting *even for necessaries*, and, accordingly, raises an obligation for him; it would seem to follow, *a fortiori*, that in the case of goods or services which are not necessaries a lunatic is incapable of binding himself by contract.

Further, it will be observed also that in none of the above-mentioned systems of foreign law is it necessary that the person dealing with the lunatic must be aware of the insanity in order to render the contract void. In the Common Law of England, however, by the decision in *The Imperial Loan Co. v. Stone* (a), an exception to this universal doctrine of incapacity seems to have been established, inasmuch as insane persons are declared to be bound by their contracts unless the other parties to such contracts knew or had reason to believe that the lunacy existed.

It is remarkable that in the judgment of the Court in *The Imperial Loan Co. v. Stone* (b) no reference is made to the character or degree of the insanity, and that both in *Molton v. Camroux* (c) and in *The*

(a) Supra. (b) Supra. (c) Supra.

Imperial Loan Co. v. Stone (a) not only was the question of incapacity ignored by the Court, but no regard was had to the analogy as to capacity and consent which exists between contracts of marriage—into which a lunatic may *not* enter—and ordinary contracts.

In the three judgments delivered in the Court of Appeal in *The Imperial Loan Co. v. Stone* (b) the above-mentioned fundamental conceptions of the Common Law were not challenged : they appear rather to have been ignored. The effect of the decision is to impose liability upon a lunatic for his alleged contracts upon grounds presumably either of equity, or of expediency, or of convenience of trade. Let us consider these grounds. It is obvious that where A. enters into a contract with B. (who, as far as A. knows, is quite capable of managing his own affairs), he might suffer damage if the contract were nullified subsequently owing to the fact that B. was insane at the time of the transaction. For example, where a tobacconist receives an order for a consignment of cigars, and in good faith executes it, it is hard on him to receive intimation that the person who gave him the order was *non compos mentis*, and that, consequently, he cannot recover the price of the cigars. There is no doubt that he would be entitled to get back such of the cigars as had not been consumed and, so far as the estate of the lunatic had benefited, he would be entitled, on general principles of equity, to recompense. In any event, there is hardship, inasmuch as he suffers loss by losing his profit.

Consideration of the following case, however, will show that the hardship is not confined to the tradesman. A lunatic who has insane delusions which are accompanied by animosity against his relatives (*quod frequenter accidit*) despatches to a dealer all his family plate and valuable ornaments, with a letter instructing

(a) Supra. (b) Supra.

the dealer to dispose of them immediately for what they will fetch because the owner is in urgent need of money. The dealer, in good faith, sells the goods. In this way rare curios or articles of great sentimental value to the family are disposed of at a price greatly below their intrinsic value. It would certainly be very hard for the lunatic (upon recovery), or for his family, if the goods could not be recovered upon payment of the price at which they were sold.

Similarly, where A., who has suddenly become insane, meets an unscrupulous acquaintance (B.) who induces him to become surety to a bill for an amount sufficient to exhaust the whole of A.'s fortune: the bill is discounted (A.'s credit being good), and B. either absconds with the proceeds or squanders them and becomes bankrupt. The discounters acted in good faith and had no knowledge of A.'s insanity. It would seem to be repugnant to the principles of equity that the lunatic should be compelled to meet the bill, (the nature of which he could not *ex hypothesi* have understood) and, consequently, be ruined. The foregoing illustration represents the effect of the decision in *The Imperial Loan Co. v. Stone* (a). In the hypothetical case referred to there is a conflict of equity, inasmuch as it would doubtless be hard on the discounters of the bill if they suffered the loss when acting in good faith (as is the case where the signature to a bill is discovered to be a forgery), or where, as in *Lewis v. Clay* (b) the signature was obtained by deceit as regards the document signed. It should be borne in mind, however, that bill discounters are able to make all proper enquiries and to take steps to protect themselves. Further, if of two innocent parties, it is requisite that one should suffer, it is equitable that the Courts should decide in favour of him who is least capable of protecting his own interests.

(a) Supra. (b) 67 L.J. Q.B. 136.

The inadequacy of the decision in *The Imperial Loan Co. v. Stone* (a) as a rule of the law of contract is demonstrated further by a consideration of the circumstances depending upon contracts entered into by parties who have not seen each other. Much business is transacted to-day by means of contracts entered into, through the medium of the Post Office, by parties who might have had no opportunity of meeting personally before the completion of the contract. A lunatic, although deeply deluded, may be (as many of them are) capable of writing a rational business letter accepting an offer made by an advertiser to supply certain goods. The lunatic orders a large quantity of goods without any regard to his need or to his means. It would seem to be inequitable for the lunatic, upon his recovery, or for his friends, to be precluded from recovering the money paid upon restoring the goods. In this connexion it must be remembered that the rule laid down in *The Imperial Loan Co. v. Stone* is absolute; *i.e.*, no distinction is made in cases where *restitutio in integrum* is possible, although in *Molton v. Camroux* (which was the authority for *The Imperial Loan Co. v. Stone*) the need for such a distinction was not overlooked by the Court.

Again, in the law relating to the capacity of lunatics to marry (b) the English Law does not follow out to its logical conclusion the rule in *The Imperial Loan Co. v. Stone* (c), inasmuch as while it is true that marriage is something more than a contract since it results in an alteration of *status*, the contractual element is the predominant feature of marriage. In *Turner v. Meyers* (d) Lord Stowell said :—" Marriage is a contract as well as a religious vow, and, like other contracts, will be invalidated by the want of consent of capable persons." In *Hancock v. Peaty* (e)

(a) Supra.
(b) See Chapter IV. *infra.*
(c) Supra.
(d) 1 Hagg. Comm. 414.
(e) L.R. 1 P. & D. 335.

it was held that marriage with a lunatic is null even though the other contracting party was ignorant of the fact. In this case a man married a woman who was found to be insane at the date of the marriage, and the marriage was afterwards set aside at the instance of the woman's guardians, although the husband established to the satisfaction of the Court that he was in ignorance of the existence of the insanity when the ceremony was performed. The argument turned upon the mere incapacity—through insanity—of the woman to contract, and the judgment rests upon clear and intelligible principle.

Now, if it be contended that the modern rule rests not upon principle but upon the unfairness which would be suffered by parties who, having *bona fide* entered into contractual relations with a lunatic, have their contracts upset for want of capacity on his part, it is difficult to understand why the Common Law should apply an entirely different doctrine to infants. No judge or text-writer has yet attempted to explain why an infant, whose intelligence is limited, is treated more favourably by the law than a lunatic, who has no intelligence at all. If a tradesman enter into a contract with a young man aged twenty years who appears to the tradesman to be over twenty-one years of age, the former will have to bear the loss suffered as a result of his mistake unless the goods sold were necessaries. The infant may even have been guilty of deliberate deception, but this fact does not make the contract valid. The tradesman acts at his peril.

Inasmuch as the policy of the law of England is to protect infants, on the ground of their immaturity of reason, much more is it to be expected that the law would protect lunatics who have no reason at all, especially when it is remembered that in no other legal system is the principle of protecting infants carried

to such an extreme extent as is done in English Law.

The Roman Law allowed minors (*i.e.*, persons between fourteen and twenty-five years) to make contracts without the *auctoritas* of curators, subject only to two qualifications, *viz.*, (i) that such contracts could be challenged within a certain time, (ii) that *restitutio in integrum* would be allowed if the contracts were proved to be detrimental to the minors.

The law of Scotland is almost identical with that of the Roman Law except that the age of majority is fixed at twenty-one years. The Scots law allows a period of four years after the attainment of majority during which contracts entered into and deeds executed by infants may be set aside if such acts be proved to have been against the infants' interests.

It would seem that in neither *Molton v. Camroux* (a) nor in *The Imperial Loan Co. v. Stone* (b) did the Court consider the analogy hitherto recognised in the English Law as existing between the law relating to lunatics and that relating to infants. In both cases the opinion of the Court in *Thompson v. Leach* (c) where it was stated that "the cases of lunatics and infants go hand-in-hand because the same reasons govern both," was ignored. The following words of the judgment in *Thompson v. Leach* would seem to show that the principle referred to was fully apprehended by the Court:—"It is incongruous to say that acts done by persons of no discretion shall be good and valid in the law: such are infants and lunatics: and it stands with great reason that what they do should be void, especially when it goes to the destruction of their estates."

As the law stands at present, therefore, infants incapacitated from contracting, except for necessaries, (Infants' Relief Act, 1874) are not estopped from pleading their infancy, whereas by the decision

(a) Supra. (b) Supra. (c) Supra.

in *The Imperial Loan Co. v. Stone* (a) lunatics are estopped from pleading *non compos mentis* unless the other party knew of the insanity.

In view of the conclusions stated above relative to the decision in *The Imperial Loan Co v. Stone* it is of much significance that the Judicial Committee of the Privy Council have, upon at least two occasions since the hearing of the case referred to, refused to follow that decision.

The first case was decided in 1904, when an appeal was heard from a judgment of the High Court of Australia in which it had been held in a suit for the rectification of a share register that a power of attorney executed by the plaintiff when he was a lunatic and did not understand what he was doing was void, and that the transfer of the plaintiff's shares effected by the defendant company under such power of attorney was a nullity *although the company had no notice of the insanity*. In stating their lordships' reasons for refusing leave to appeal, Lord MacNaughten said:—" Their lordships, having had the advantage of hearing argument on both sides, see no reason to doubt that the judgment of the High Court is right " (b). The decision in *Thompson v. Leach* (c) was referred to with approval and so also was that in *Elliot v. Ince* (d). His lordship proceeded as follows:—" The risk to a company acting on a power of attorney is no doubt considerable, but the directors can protect themselves to some extent by making careful enquiries—a precaution apparently not taken in the present case." It is significant that Lord MacNaughten referred to the power of attorney as " mere wastepaper," owing to the state of mind of the person executing it, and he said, " It is difficult to see

(a) Supra.
(b) *Daily Telegraph Newspaper Co. v. McLaughlin* (1904) A.C. 776.
(c) Supra. (d) Supra.

how anything which rests on it as the foundation and groundwork of the whole superstructure can be of any validity, whether the transaction is beneficial to the lunatic or not." From the words of the judgment quoted, it would seem that the Judicial Committee appreciated the fact that the company had no notice of the insanity.

The second case which was argued before the Judicial Committee was that of *Molyneux v. Natal Land and Colonization Co.* (a) where it was held that a contract made by an insane person is absolutely void, and not merely voidable, *in spite of the fact that the other party did not know of the existence of the insanity*. While it is true that this case was determined by reference to Roman-Dutch Law, the following words from the judgment of the Judicial Committee are important, inasmuch as they indicate the attitude of the Committee to the decision in *The Imperial Loan Co. v. Stone* (b) :—" Even if the law of England had been applicable to the present case, their lordships are unable to agree with the majority of the Natal Court that the bond sued upon would have been enforceable." The decision in *Daily Telegraph Newspaper Co. v. McLaughlin* (c) was referred to with approval.

These decisions would seem to indicate that the House of Lords would hesitate to uphold the decision in *The Imperial Loan Co. v. Stone* (d).

It is significant that in two modern statutes (*viz.*, The Indian Contract Act, 1872, and the Sale of Goods Act, 1893), the legislature has laid it down in unmistakeable language that a lunatic is incompetent, by reason of his mental incapacity, to enter into contracts (e).

In conclusion, it is submitted that, from the fore-

(a) (1905) A.C. 555. (b) Supra. (c) Supra. (d) Supra.
(e) Act of 1872, SS. 11 & 12; 56 & 57 Vict. C. 71, S. 2. *Mohori Bibee v. Dharmodas Ghose* (1903) L.R. 30 I A. 114.

going consideration of the relevant facts and principles, the decision in *The Imperial Loan Co. v. Stone* (a) as to the contractual liability of lunatics is inconsistent both with the Common Law of England and with the principles of Equity.

In the light of the facts revealed by the research indicated in the preceding pages, it would appear that the present law as to contracts alleged to have been entered into by lunatics during insanity should be declared to be as follows :—

The alleged contract is void, but, with the object of preventing the lunatic from benefiting from his acts, the lunatic or his estate shall be required to make restitution to the other party where :—

(i) The lunatic has derived benefit as a result of his act, and

(ii) Where the other party has suffered loss as a result of the act of the lunatic.

This conclusion would appear to be consistent both with the principles of the Common Law and with the rule of Equity that no one is to be enriched at the expense of another—*nemo cum detrimento alterius locupeltari potest.*

Part II.—Lucid Intervals.

The legal position of a lunatic so found by inquisition, and the law as to acts done in a lucid interval is as follows :—

It was held in *Re Walker* (b) that a lunatic so found by inquisition cannot, while the inquisition is in force, deal with his property by deed *even in a lucid interval.* This ruling is quite consistent with the law as stated by Coke viz :—that a person who had once been found *non compos mentis* by office at the King's suit was incapable of executing or making any lease,

(a) Supra. (b) (1905) 1 Ch. 160.

release, gift or feoffment: and that it was the duty of the Crown to avoid all such acts and to cause the property affected to be revested in the lunatic (a).

As to acts done *inter lucida intervalla* by a lunatic *not so found*, it was decided in 1603 in *Beverley's case* (b) that all such acts are binding upon a lunatic whether the person dealing with him has notice of his lunacy or not. This rule has been followed in *Birkin v. Wing* (c) where an action was brought by a purchaser against the executors of a vendor for specific performance of an agreement to sell an estate, and the defence was unsoundness of mind and incapability. It was held that, although one of certain delusions from which the vendor suffered did to some extent enter into the contract, yet, inasmuch as there was strong professional evidence that the vendor perfectly understood the nature of the transaction, the vendor should, in the circumstances, be called upon specifically to perform the contract.

In an earlier case (d) it was held that the acts *inter lucida intervalla* of a lunatic not so found are valid, though he may be confined at the time in an asylum and even under restraint. It was held in *Hall v. Warren* (e) that a contract entered into by a lunatic during a lucid interval is as binding as if made by a person of perfectly sound mind.

In the practice of the Court of Chancery, where a person who had entered into a contract was subsequently found to be a lunatic from a date prior to the contract it was competent for the other party to sue for specific performance, and to obtain decision of the questions (i) whether the defendant was a lunatic at the time of the contract, and, if so, (ii) whether he had lucid intervals, and (iii) whether the contract was executed during a lucid interval; or he might ask, in the

(a) 4 Rep. 126 & 127. 8 Rep. 170a., 338; Co. Litt. 247a; 3 Bac. Abr. Idiots & Lunatics. "C." and "F."

(b) Supra.

(c) 63 L.T. 80.

(d) *Selby v. Jackson.* 6 Beav. 192.

(e) 9 Ves. 605.

alternative, to have the contract either performed or discharged; and in the latter case, the Court would allow him, if a vendor, to retain out of the deposit his costs, charges, and expenses (a).

The practice followed in such cases in the asylums under the control of the London County Council is to allow certified lunatics to execute deeds and similar documents with the consent of the statutory committee of visitors, provided always that the chief medical officer of the asylum certifies that at the time of the execution of the document the lunatic understood the nature and purport of his act.

Before the Judicature Act various distinctions were drawn from time to time between different classes of transactions with the object of determining the civil responsibility of lunatics in respect of their acts, in spite of the general rule that the civil acts of lunatics are void. Thus matters of record (*e.g.*, fines and recoveries, recognizances, etc.), were regarded in totally a different light from acts and contracts *in pais*. It was held that "all acts which a man *non compos* doth in a court of record shall bind himself and all others for ever," and further, that alienation *by fine or by recovery* was binding even when by office found the *non compos* had been brought under the protection of the Crown (b).

It appears that this rule was frequently disregarded both at Common Law and in Equity on the ground that either Court in the exercise of its ordinary jurisdiction could, by the appropriate means, set aside *any* transaction which it deemed inequitable (c).

In the absence of recent cases dealing with the matter, it is submitted that, in accordance with the doctrine which seems to have been followed fairly consistently in many old cases, the liability of a lunatic

(a) *Frost v. Beaven.* 17 Jur. 369. *Neill v. Morley* 9 Ves. 478.
(b) 4 Rep. 124; *Mansfield's Case*, 12 Rep. 123.
(c) *Ex parte Roberts*, 3 Atk. 308; *Frank v. Mainwaring*, 2 Beav. 115.

in respect of an act of record would be determined by equitable considerations similar to those which determine his responsibility for acts *in pais*.

Part III.—Supervening Insanity and Contracts.

Supervening insanity does not release a person from his obligations under a contract, unless the nature of the insanity render the performance of the contract impossible (a). So that where a dentist who had contracted to perform a series of dental operations became insane before the completion of the contract, it would appear that, on grounds of equity, payment to the lunatic *quantum meruit* could be ordered by the Court.

It would seem that the High Court would, on the analogy of the relief which it gives in the case of partnership, dissolve the relation of master and apprentice in the event of the supervening insanity of either party.

If a solicitor to whom a clerk has been articled become insane during the continuance and before the completion of the clerkship, the Court will discharge the clerk from his duties and allow him to enter into fresh articles for the remainder of his term of service; but the Court will not allow the period during which the principle has been insane, and before the new articles are entered into, to be reckoned as part of his requisite period of service (b).

The difficulties which formerly stood in the way of the application of other remedies have now been removed by the provisions of Sections 133 (*et seq*) of the Lunacy Act, 1890.

Where, for instance, a contract for the sale of leasehold property had been entered into by a lunatic before his insanity and had been acted upon so as to

(a) *Hall v. Warren* (Supra), *Owen v. Davies*, 1 Ves. 82; *Pegge v. Skynner*, 1 Cox. 23.

(b) *Ex parte Turner*, 10 L.J., N.S., Q.B. 356.

entitle the purchasers to judgment for specific performance, an order was made under Section 137 of the Lunacy Act, 1890, vesting the property in the purchasers after payment by them of the purchase money to the lunatic's curator (a).

Nevertheless, insanity supervening after the contract had been entered into and before performance may prevent the lunatic from doing a personal act in performance of the contract, *e.g.*, a covenant for quiet possession (b). Similarly, it would seem that an uncompleted contract of service would be rendered void by the supervening insanity of the servant, and also, where the nature of the service is personal, by the supervening insanity of the master.

The effect of supervening insanity upon the contracts of partnership and of marriage is dealt with below (see Part VI of Chapter III and Chapter IV.)

Part IV.—Lunacy and the Contract of Agency.

It was held in the case of *Drew v. Nunn* (c) that the effect of insanity of either of the parties is not to invalidate the general law as to principal and agent: and that, therefore, where a person has held out another to be his agent, he is bound by the acts of the agent, although the latter's authority may have been revoked, if he have not given notice and the agent wrongfully enters into a contract upon the principal's behalf. If the principal become insane, he cannot withdraw the authority which he had conferred upon the agent. The Court observed that it must be appreciated that, however much the principal may suffer innocently through the agent's wrongful acts, it is also true that some innocent third person who contracts with the agent may suffer equally with the principal. It does not lie, therefore, in the principal's

(a) *Re Pangani* (1892) 1 Ch. 286.
(b) *Cowper v. Harmer*, 57 L.J. Ch. 460.
(c) 4 Q.B.D. 661.

mouth, upon his recovery, to say that the innocent third person shall be the sufferer: although the rule that until a third person has notice that the agent's authority was revoked by the principal's insanity he is entitled to act upon the principal's representations may be hard upon an insane principal, it must be borne in mind that lunacy is not a privilege but a misfortune which must not be allowed to injure innocent persons.

A lunatic cannot, during the continuance of his insanity, effectively appoint an agent (a).

In *Yonge v. Toynbee* (b), it was held by the Court of Appeal that an agency created during sanity will be determined *ipso facto* by the lunacy of the principal or of the agent. Thus, where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, and, subsequently to such death or lunacy, the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person—representing in so doing, that he was acting on behalf of the principal—the agent is liable (as having impliedly warranted to that other person the existence of the authority which he assumed to exercise), in respect of damage occasioned to him by reason of the non-existence of that authority. In other words, the law refuses to allow a third party who enters *bona fide* into a contract with an agent to suffer as a result of the termination of the agent's authority owing to the incapacity of the principal.

It will be observed that, so far as regards agency, the law follows the old rule that the contracts of a lunatic are void (c) rather than the law as stated by Littleton and Coke and modified by *Molton v. Camroux* (d). That is to say, the liability which the law imposes up-

(a) *Elliot v. Ince.* 7 De G.M. & G. 475.
(b) (1910) 1 K.B. 215, C.A.
(c) Part I. (Supra) p. 65.
(d) Supra.

on an agent who enters into a contract on the behalf of a principal who has (unknown to the agent) become insane is based upon the principle that, inasmuch as a lunatic has no capacity to contract, his agent cannot do what his principal cannot do.

Part V.—Insanity and the Contract of Insurance.

The principle upon which the maxim *caveat emptor* is founded does not apply to the contract of insurance. Not only must the party proposing the insurance abstain from making any deceptive representation, but he must observe the utmost good faith (*uberrima fides*). He is required to state not only all matters within his knowledge which he believes to be material to the question of the insurance, but all of which in point of fact are so. An entire disclosure must be made of all material facts known to the assured.

Although a lunatic is incapable of entering into a contract of insurance, any person who has an insurable interest in his life may insure it. On insuring the life of a lunatic the fact of his lunacy should be disclosed, especially if the lunacy be of such kind as to affect his bodily health (a).

Where a person who having, while *compos mentis*, insured his life, dies by his own hand, and the coroner's jury return a verdict of *felo de se*, the contract of insurance is avoided on the ground of public policy, in consequence of the fact of the death's being occasioned by the deceased's own criminal act (b); but, where the act of suicide takes place when the assured is insane, then, whether he be beneficially interested in the insurance or not, the policy is not avoided, unless the contract contain a special condition inserted with a view to meeting such a contingency (c).

(a) *Lindenau v. Desborough*, 3 Man. Y Ry. (K.B.) 45.
(b) *Amicable Society v. Bolland*, 4 Bli. (N.S.) 194 H.L.
(c) *Horn v. Anglo-Australian & Universal Life Assurance Co.* 30 L.J. (Ch.) 511

Although a condition in the contract supporting the insurance in the event of the suicide of the assured (he being at the date of the taking of his own life beneficially interested in the policy and of sound mind) is void for the reason stated above, it would seem that a condition supporting the insurance in the event of suicide while under the influence of insanity and whether or not the assured is beneficially interested in the policy would not be void.

Notwithstanding the fact that the practice of condoning the self-murder of suicides by declaring them to have been insane at the time of the felony may be traced historically to a desire on the part of the jury to prevent suffering by the deceased's relatives and the shame involved by the suicide's burial at the cross-roads instead of in the churchyard, it would appear that it is the common knowledge that the law is as stated above which influences coroners' juries to-day in their verdicts, and induces them frequently not to return a verdict of *felo de se* in many cases where there is, in fact, a strong presumption against the truth of the suggestion that the deceased was temporarily insane at the time when he took his own life.

Where a policy contains a condition avoiding the policy in the event of the assured's committing suicide or dying by his own hand, the condition applies, in spite of the fact that the assured may have taken his life while in a state of insanity, because the moral condition of mind is not material in such case (a).

Part VI.—Insanity and the Contract of Partnership.

The foregoing statements relative to a lunatic's capacity to contract apply *mutatis mutandis* to partnership.

(a) *Borrowdaile v. Hunter*, 5 Man. & G. 639. *Dufaur v. Professional Life Assurance Co.* 25 Beav. 599.

The lunacy of a partner does not *of itself* dissolve the partnership unless the articles contain a provision to that effect: hence, unless steps be taken for dissolution, the insane partner continues to be entitled to share the profits and to be liable for the losses of the firm (a).

The confirmed lunacy of an active partner is a sufficient ground for the High Court to decree a dissolution at the suit of the other partner or partners (b).

By Section 35 of the Partnership Act 1890, dissolution of partnership may be obtained by judicial order, that is to say, where a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be permanently insane, the Court may dissolve the partnership.

The High Court will dissolve a partnership at the suit of a lunatic partner, whether he has been so found by inquisition or not (c). Where the lunatic has been so found by inquisition, the committee of the estate, under the direction of a judge in lunacy, would be joined (d).

Where the lunatic has not been so found, he may, (but it does not follow that he will) obtain a final decree without an application to the jurisdiction in lunacy (e).

The lunatic sues by his next friend—who appears to be subject to the common risks of next friends. Thus he may have his proceedings wholly repudiated by the lunatic, if he should recover his reason, or by the Court, if the lunatic should be so found by inquisition (f).

Before the Court will decree a dissolution of partnership on the ground of the insanity of one of the

(a) *Sadler v. Lee*, 6 Beav. 324. *Waters v. Taylor*, 2 Ves. & Bea. 299; *Jones v. Noy*, 2 Myl. & K. 125.
(b) *Rowlands v. Evans*, 30 Beav. 302.
(c) *Sadler v. Lee*, (Supra) *Jones v. Lloyd* L.R. 18 Eq. 266.
(d) *Beall v. Smith*, L.R. 9 Ch. 85.
(e) *Light v. Light*, 25 Beav. 248.
(f) *Beall v. Smith*, Supra.

partners, it requires to be satisfied by clear evidence that the insanity exists at the date of the hearing and that it is probably incurable (a). Proof of the fact that insanity existed in the past, or that the partner once suffered from a temporary attack of insanity, is not sufficient (b).

Before making a final decree, the Court will sometimes direct an enquiry whether the alleged lunatic is in such a state of mind as not to be able to conduct the business of the firm in partnership with the other members of the firm according to the articles of partnership. It appears, however, that no such enquiry is necessary where the partner is a lunatic so found by inquisition (c).

The existence of insanity does not prevent the dissolution of the partnership upon any of the grounds provided by the articles, or upon any grounds which would operate to dissolve it if all the partners were in their senses (d). Articles of partnership commonly contain provision for dissolution upon the giving of a specified notice: and a partnership at will is, in all circumstances, dissoluble upon notice. Such notice may be given validly and may be acted upon although one of the partners may have become insane, inasmuch as the partner who serves the notice is not bound " to find understanding " for him that is served. Notice once served upon a lunatic partner cannot be withdrawn (e).

Where a partnership has been dissolved as above, the committee may join and concur in the winding up (f). The date from which dissolution will be decreed is governed by the ordinary law relating to partnership. A simple method of dissolution is

(a) *Kirby v. Carr*, 3 Y. & C. 184; *Dibbins v. Dibbins*, 44 W.R. 595.
(b) *Pearce v. Chamberlain*, 2 Ves. 35.
(c) *Milne v. Bartlett*, 3 Jur. 358.
(d) *Jones v. Lloyd*, 18 Eq. 265.
(e) *Jones v. Lloyd*, Supra.
(f) Lunacy Act, 1890, secs: 119 & 124.

provided by Sections 119 and 124 of the Lunacy Act, 1890. The judge may, by order, dissolve the partnership and, as in the case above, the committee, or such other person as may be approved by the judge, may join and concur in winding up the partnership. It would appear that under the Lunacy Act, 1890, only cases of supervening insanity can be dealt with, and that the powers conferred upon the Court by Section 119 of the Lunacy Act are available only where the proceedings are not contentious.

Upon the recovery of a lunatic partner, where no decree of dissolution of partnership has been pronounced, he is entitled to resume his share and direction of the partnership business. If necessary, an injunction will be granted, upon the application of the recovered partner restraining the other partner or partners from preventing him from transacting the business of the firm as a partner, and the Court will restore him to his rightful position in the firm (a).

Part VII.—Lunatics and Necessaries.

In all cases where a lunatic has been supplied with such goods as come within the scope of the term "necessaries," a person who has supplied the articles will have a claim against the lunatic or his estate for the cost, provided that it be proved to the satisfaction of the Court that the expense was incurred on the understanding, either express or implied, that it would be repaid (b).

The question whether or not a lunatic can be made liable for the cost of necessaries supplied to him either under an express contract or under an implied obligation, was considered by the Court of Appeal in the case of *In re Rhodes*, *Rhodes v. Rhodes* in 1890 (c). It is unnecessary to set out here the circumstances which gave rise to the action, but it is interesting to

(a) *Anon*, 2 K. & J. 441, J.V.S. (1894) 3 Ch. 72.
(b) *re Rhodes*, *Rhodes v. Rhodes*, Supra. (c) Supra.

observe that the Court of Appeal approved the rule which had been laid down in 1663 in the case of *Manby v. Scott* (a) where it was decided that an infant and, by analogy, a lunatic, is bound to pay for necessaries provided for him: that is to say, whenever necessaries are supplied to a person who by reason of disability (*e.g.*, infancy or lunacy) cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. Accordingly, an obligation may be implied on the part of a lunatic, whether so found or not, to repay a person who has supplied necessaries for him, provided always that the necessaries supplied are suitable to the position in life of the lunatic.

In the case of *In re Weaver* (b) it was doubted whether there could exist an implied contract on the part of a lunatic to pay for necessaries supplied to him, and the rule was explained by the Court's pointing out that the doubt arose from the unfortunate terminology of English Law, owing to which the expression "implied contract" had been used to denote not only a genuine contract established by inference, but also an obligation which did not arise from any real contract, but could be enforced as if it had a contractual origin. Obligations of this sort are those which were recognised by the Roman jurists and were styled by them "*Obligationes quasi ex contractu.*"

The question of the liability for necessaries supplied to the wife of a lunatic was considered in the case of *Richardson v. Du Bois* (c), where a lunatic's wife gave orders to a builder for repairs to be effected to the inside of the lunatic's house. After some of the repairs had been carried out, the builder became aware that the husband was a lunatic and was under treatment in an asylum, but he continued to do the repairs under the wife's directions. The wife paid a portion

(a) 1 Sid. 112. (b) 21 Ch. D. 615. (c) 5 Q.B. 54.

of the builder's account but refused to pay the balance: whereupon the builder sued the husband for the balance due. The repairs were admitted to be necessary for the preservation of the house. It appeared, however, that the wife received from the husband's estate, and from friends, a yearly income which was sufficient for all purposes, including the repairs to the house. It was held that, in these circumstances, the husband was not liable, because the authority of a wife to pledge her husband's credit was no greater in the case of a lunatic than in the ordinary case of husband and wife where the husband had made an allowance to the wife for necessaries.

A husband is liable for necessaries supplied to his wife during his insanity (a), inasmuch as the wife's authority to pledge her husband's credit for necessaries is not a mere agency, but springs from the relation of husband and wife, and is not revoked by the bare face of the husband's insanity. Thus, in *Drew v. Nunn* (b) where a tradesman had, before a man's insanity, supplied necessaries to the wife with the husband's knowledge and approval, the latter was not allowed upon his recovery to escape payment of the price of the goods supplied during his lunacy. A lunatic husband is liable also for moneys advanced to his wife for the purchase of necessaries, although she may have a separate income (c).

The foregoing rules are based upon those of the Common Law relating to the ability of a wife to pledge her husband's credit for necessaries (d).

By Section 2 of the Sale of Goods Act, 1893, where necessaries are sold and delivered to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable

(a) *Read v. Leggard*, 6 Exch. 636.
(b) 4 Q.B.D. 661.
(c) *Re Wood's Estate, Davidson v. Wood*, 1 D. G.J. & Sm. 465 C.A.
(d) *Manby v. Scott*, 1 Sid. 112; *Montague v. Benedict*, 3 B. &. C. 631; *Seaton v. Benedict*, 5 Bing. 28.

price therefor. "Necessaries" in this section means goods suitable to the condition in life of the purchaser and to his actual requirements at the time of the sale and delivery. In other words, a lunatic is liable, *quasi ex contractu*, for necessaries supplied to him.

The term "necessaries" has been held to include all expenses necessarily incurred for the protection of the lunatic's person or estate, such as the cost of the proceedings in lunacy (a), in addition to the common necessaries of life, having regard to the social status of the lunatic (b). Where in an action for goods supplied to an infant the plaintiff replied that they were necessaries, it was held that the question of "necessaries" or "not necessaries" is one of fact, and, therefore for the jury: but, like all other questions of fact, it should not be left to the jury by the judge unless there be evidence upon which they can reasonably find in the affirmative (c).

"There is a Common Law liability to repay the expenses necessarily incurred for the benefit of the lunatic, whether that liability be a liability upon an implied contract or not: it is a liability which the law recognises on the part of the lunatic or lunatic's estate. . . . It is a liability to the person who has supplied the necessaries," per *Fry L. J. in West Ham Union v. Pearson* (d). This case was followed by *in re J. (a person of unsound mind not so found by Inquisition)* (e) where it was held by the Court of Appeal that the cost of the maintenance of a criminal lunatic can be recovered by the Crown against property to which the lunatic has become entitled, as being due under an implied obligation to pay for that maintenance as a necessary.

(a) *Stedman v. Hart*, Kay 607.
(b) *Ryder v. Wombwell*, L.R. 4 Exch. 32 Ex. Ch.
(c) *Ryder v. Wombwell*, L.R. 4 Exch. 32 Ex. Ch.
(d) 62 L.T. 638.
(e) (1909) 1 Ch. 574.

CHAPTER IV

MENTAL DEFICIENCY AND MARRIAGE

Marriage in English Law is more than an ordinary civil contract, and the exceptional treatment which it has received in England is due probably to the fact that until 1858 matrimonial causes were heard in the Ecclesiastical Courts, where the rules of the Civil or Canon law had considerable influence. The only kind of marriage which is recognised by the English law is one which is essentially " the voluntary union for life of one man and one woman to the exclusion of all others " (a).

Marriage with a lunatic so found by legal inquisition is null and void to all intents and purposes whatsoever, even though it may have been celebrated during a lucid interval (b).

In the case of a lunatic not so found by legal inquisition, the marriage will be invalidated where consent is wanting by reason of the incapacity of either of the parties of comprehending the nature and of fulfilling the physical conditions of the marriage contract (c). The absence of consent makes the contract *void ab initio* and not merely voidable (d) : for this reason, it has been held in the English Courts that no sentence of avoidance is necessary (e).

The existence of mental incapacity at the time of the marriage must be established by evidence : every-

(a) *Re Ullee, The Nawab Nazim of Bengal's Infants*, 53 L.T. 711.
(b) *Marriage of Lunatics Act*, 1811. 51 Geo. III. c. 37.
(c) *Hancock v. Peaty*, L.R. 1 P. & D. 335.
(d) *Harford v. Morris*, 2 Hagg. Cons. 423.
(e) *Elliot v. Gurr*, 2 Phillim. 16.

thing is presumed in favour of the marriage (a). The validity of the marriage is determined by the capacity of the party at the actual time of marriage, and not by the state of the party's mind before or after the marriage (b).

In cases where the degree of mental incapacity necessary in order to invalidate a marriage has to be determined, the Court laid down in *Harrod v. Harrod* (c) that it is essential that the difference between the incapacity which arises from actual insanity and mere dullness of intellect should be borne in mind.

The incapacity arising from actual insanity must be such that the party was, at the time of the marriage, incapable either (i) of understanding the nature of the contract and the duties and responsibilities which it creates (d) ; or (ii) of taking care of his own person or property (e).

The question upon which the Court has to come to a decision in cases where a marriage is sought to be set aside on the ground of the insanity of one of the contracting parties is not, as in many testamentary cases, one of variety or degree in strength of mind, with the more or less failing condition of intellectual power in the prostration of illness, or one of decay of faculties in advanced age, but one of health or disease of mind.

" The law rests upon the simple proposition," says Lord Stowell in *Turner v. Meyers* (f), " that marriage is a contract as well as a religious vow, and, like other contracts, will be invalidated by the want of consent of capable persons." It is obvious that if any contract more than another is capable of being invalidated

(a) *Portsmouth v. Portsmouth*, 1 Hagg. Ecc. 355.
(b) *Hancock v. Peaty*, Supra.
(c) 1 K. & J. 4.
(d) *Durham v. Durham*. 10 P.D. 80.
(e) *Browning v. Reane*, 2 Phillim, 69.
(f) 1 Hagg. Cons. 414.

on the ground of the insanity or mental deficiency of either of the contracting parties, it is the contract of marriage, inasmuch as it consists in an act by which the parties bind their persons and their property for the rest of their lives.

In *Hancock v. Peaty* (a) it was decided (i) that where the Court is satisfied from the evidence brought before it that the mind of the contracting party was diseased at the time of entering into the contract, the marriage must be pronounced to be null and void ; and (ii) that the Court will not enter into a consideration of the extent of the derangement of the mind. In the celebrated case of *Durham v. Durham* (b) the law upon this important question was carefully considered by the Court. It was held that a decree of nullity will not be granted unless the Court be satisfied that, at the date of the marriage, the respondent was incapable, by reason of insanity, of understanding the nature of the marriage contract and the duties and responsibilities which it creates.

Inasmuch as the contract of marriage is very simple, it does not require a high degree of intelligence to comprehend it ; so that, although a party may be dull mentally or may exhibit peculiarities of conduct resembling insanity, the marriage will not be annulled, unless insanity of a *pronounced* type be proved to have existed *at the time of the marriage*. The decisions in the subsequent cases of *Hunter v. Hunter* (c) and *Cannon v. Cannon* (d) show clearly that, however strange and insane the conduct of a party may be even soon after marriage, the Court will not annul a marriage unless it be fully established that actual insanity existed at the time of the marriage.

Weakness of intellect, as distinguished from actual insanity or pronounced mental deficiency, is not a sufficient ground for invalidating a marriage unless

(a) Supra. (b) Supra.
(c) 10 P. D. 93. (d) 12 P. D. 96.

fraud also be proved; and, where fraud is clearly proved, weakness of mind may be presumed from the tender years of the party (a).

There are four classes of persons who may institute proceedings in the High Court of Justice to set aside a marriage, on the ground of the insanity at the time of the marriage of one of the contracting parties.

(i) The contracting party upon recovery.

If however, the contracting party, having recovered, take no steps to invalidate the marriage, no other person may institute proceedings on his behalf (b)

(ii) His committee where the contracting party is a lunatic so found by inquisition (c).

(iii) Where the contracting party is a minor or a lunatic *not* so found by inquisition, a guardian duly appointed for the purpose (d).

(iv) Where the contracting party is dead, any person having an interest in the matter (e).

The following statement of the law upon this matter which is in force in a number of other countries forms an interesting commentary upon the above dictum of Lord Stowell (page 105) :—

British Dominions

Scotland. Insanity or intoxication in either of the parties is an impediment to marriage : if the ceremony have been performed the marriage may be annulled upon proof of the existence of the disability.

Ireland. The voluntary consent of both parties is requisite. Incapacity, *e.g.*, insanity, of either of the parties to conclude the marriage contract, is a ground upon which an action for nullity of marriage may be maintained.

(a) *Portsmouth v. Portsmouth*, Supra; *Harford v. Morris*, Supra.
(b) *Turner v. Meyers*, Supra.
(c) *Portsmouth v. Portsmouth*, Supra.
(d) *Morduunt v. Moncrieffe*, L.R. 2 Sc. & Div. 374; *Hancock v. Peaty*, Supra.
(e) *Browning v. Reane*, Supra.

Isle of Man. Marriage where one of the parties is a lunatic at the time of the marriage is null and void.

Channel Islands. Marriage where one of the parties is a lunatic at the time of the marriage is null and void.

British India. (i) Among the Christian communities in India insanity is an impediment to marriage.

(ii) Under the *Mohammedan law*, each party to the marriage contract must be possessed of full mental capacity and understanding.

(iii) Under the *Hindu law*, idiots and lunatics are incapable of marriage for civil purposes only: a Hindu wife may desert or disobey her husband if he be insane.

Dominion of Canada. The free consent of both parties to the marriage is requisite. Upon proof of the insanity of either of the parties at the time of the marriage, the Courts may declare the marriage null and void.

Union of South Africa. Those persons who, on account of unsoundness of mind, are incapable of exercising their free will cannot enter into a valid marriage.

Newfoundland and New Zealand. A marriage may be annulled upon proof of insanity of either of the parties at the time of the marriage.

The Commonwealth of Australia. A marriage may be annulled in any of the States of the Commonwealth upon competent proof that one of the parties was insane at the time when the marriage was celebrated.

Foreign Countries

Argentine Republic. According to the Civil Marriage Law, insanity of either of the parties at the time of the marriage renders the marriage altogether void, and a declaration of its annulment can be demanded

by the party who was ignorant of the impediment or by those persons who may have raised opposition to the celebration of the marriage (a).

Austria. The marriage law is regulated in accordance with the creed to which the candidates for marriage profess themselves. In all cases, however, mania, insanity, and imbecility are impediments to marriage (b).

Belgium. A marriage may be objected to on the ground of the insanity of one of the future spouses, and if proved to the satisfaction of the Court, the marriage will be prohibited (c).

Brazil. Persons who for any reason are not capable of giving their verbal or written consent in an unequivocal manner are prohibited from marrying (d).

Bulgaria. There is no civil marriage, but parties to a marriage must not be afflicted with lunacy, epilepsy, feebleness of mind, or syphilis (e).

Chile. Those who are of unsound mind cannot contract matrimony, and a marriage celebrated notwithstanding the existence of this impediment is null (f).

China. If at the time of the marriage either of the parties be suffering from insanity and this be not disclosed to the family of the intended spouse, the marriage is absolutely null and void.

Cuba. Only such persons as are in the full enjoyment of their reason are capable of contracting marriage.

Denmark. The two contracting parties must be in full possession of their reasoning faculties at the time of the marriage (g).

(a) *Ley del Matrimonio Civil*, 1889. Arts. 9, 84, 85.
(b) Civil Code of 1811, Sect. 48, 75.
(c) Civil Code, Book I. Tit. V. Art. 174.
(d) Decree No. 481 of 14 June, 1890, Chap. II., Sect. 5.
(e) Law of 24 Feb., 1897, and of 7 Feb., 1900, First Part, Tit. I., Art. 186 (5).
(f) Law of Civil Marriage, 10 Jan., 1884, Sect. 2, Art. 4 (5), Sect. 6., Art. 29.
(g) Memorandum Communicated by Danish Government to the Hague Conference, May, 1900.

France. The proposed marriage may be objected to on the ground of the insanity of either of the parties. A marriage contracted without the free consent of the two spouses, or of one of them, can be avoided only by the spouses or by that one whose consent was not free (a).

Germany. Complete incapacity to give a valid declaration of intention bars a valid celebration of the marriage : this is the case with mental disorder. A marriage is null if at the time of solemnization of the marriage, one of the parties was incapable of managing his or her affairs, or was in a condition of temporary derangement of his mental activity (b).

Greece. Civil marriage does not exist in Greece. Marriage is regulated by the Roman and Byzantine Laws under which two persons of the orthodox religion may contract marriage by the performance of the ceremony by a priest of the Greek Church after the production of a licence given by the Bishop who must be satisfied that there is no impediment to the marriage. Insanity is a bar to marriage (c).

Holland. On the ground that lack of consent vitiates ordinary contracts, the free consent of the intended spouses is necessary for the validity of a marriage (d).

Hungary. Persons under an incapacity for legal action cannot contract marriage. This includes persons who on account of mental disorder or from some other cause are deprived of the power of discernment so long as such condition continues (e).

Italy. Marriage cannot be contracted by persons who are under interdiction owing to infirmity of mind (f).

(a) Civil Code, Book I., Tit. II., Arts. 174, 180.
(b) Civil Code, Sects. 1304, 1325.
(c) Law of 23 Feb., 1835.
(d) Civil Code, Book I., Tit. V., Art. 85.
(e) XXXI. Gesetz-Artekel vom Jahre, 1894, uber das Ehercht, II. Abs., § 6 ; IX. Abs., § 127 (b).
(f) Civil Code, Tit. V., *Seq.* 2 (61).

Japan. A marriage is invalid if, for any reason, the intention to contract a marriage between the parties does not exist (a).

Luxemburg. Marriage in the Grand Duchy of Luxemburg has, as regards its legal effect, an essentially civil character. Insanity in either of the contracting parties is a ground of objection to the marriage (b).

Mexico. Confirmed and incurable lunacy is an impediment to marriage (c).

Norway. Mental disease is an impediment to marriage. A marriage may, at the desire of one of the spouses, be dissolved, where the other spouse, at the time of the marriage, without the knowledge of the first, suffered from mental disease or from epilepsy (d).

Peru. Mad persons and persons suffering from mental incapacity are absolutely incapable of contracting marriage. The marriage of such persons is null (e).

Portugal. The contract of marriage is purely civil. Persons under interdiction on account of lunacy which has been established by a judgment of the Court which has become absolute, or which is notorious, may not contract marriage (f).

Roumania. The relatives of the parties proposing marriage may make formal objection to its taking place: the insanity of the intended husband or wife must be proved before the Court (g).

Russia. Marriage of lunatics or persons of unsound mind is forbidden. A marriage cannot be legally contracted without the mutual and free consent of the parties marrying (h).

(a) Civil Code of 1898, Book IV., Ch. III., Sect. 1, Sub-Sec II., Art. 778.
(b) Civil Code, Book I., Tit. II., Arts. 174, 180.
(c) Civil Code, Tit. V., Cap. I., Art. 159 (8).
(d) Law of 20 August, 1909, Sect. 3.
(e) Civil Code, Sect. III., Tit. III., Art. 142 (10).
(f) Decree No. 1 of 25th Dec., 1910, Cap. II., Art. 4 (4).
(g) Civil Code, Book I., Tit. V., Ch. III., Art. 155.
(h) Civil Code, Arts. 5, 12, 37, 301, 318.

Serbia. A marriage with a lunatic or an idiot is invalid, and ceases to be binding; the priest who performed it shall be brought to trial and punished (a).

Spain. According to the civil law, persons who at the time of contracting the marriage are not in full possession of their reason cannot contract marriage (b).

Sweden. Previously to marriage a formal betrothal takes place. The marriage may not take place if either party before or after betrothal suffered from epilepsy, insanity, or frenzy (c).

Switzerland. Marriage is prohibited with a lunatic or with an imbecile. A marriage is null where one of the spouses was at the time of the solemnisation mentally diseased or incapable of discernment as a result of some permanent cause (d).

United States of America (e)

Alabama, *Arizona*, *Arkansas*, *Colorado*, *Florida*, *Idaho*, *Iowa*, *Mississippi*, *Missouri*, *Montana*, *New Hampshire*, *New Mexico*, *North Dakota*, *Pennsylvania*, *South Dakota*, *Tennessee*, and *Texas*. Marriages of parties one of whom is an insane person or idiot at the time of the marriage ceremony are void, but such marriages may be affirmed after the restoration to reason of the party who was under the disability.

California, *Delaware*, *Georgia*, and *Maryland*. The marriage of an insane person is absolutely void.

Connecticut. It is a criminal offence for epileptic, imbecile, or feeble-minded persons to contract marriage.

District of Columbia and *South Carolina*. Marriages of idiots or of persons adjudged lunatic are voidable.

(a) Civil Code, Arts. 69, 74.
(b) Civil Code, Art. 83 (2).
(c) Marriage Law, Chap. IV., Sect. 2.
(d) Federal Law of 24 Dec., 1874, Arts. 26, 28 (3), 120 (2).
(e) "Special Report," issued by U.S. Government, on Marriage and Divorce, 1909.

Illinois. The statute provides that no insane person or idiot is capable of contracting marriage, and the Courts have set aside such a marriage after the death of the party.

Indiana, *Maine*, *Massachusetts*, *Nebraska*, and *Rhode Island*. Marriages contracted when either party is insane or idiotic at time of marriage are void.

Kansas. The marriage of an epileptic, imbecile, feeble-minded, or insane person, except the woman be over 45 years of age, is prohibited: such marriages are void.

Kentucky and *Utah*. Marriage with an idiot or lunatic is prohibited.

Louisiana. Marriages without free consent are voidable.

Michigan. No person who has been confined in any public institution or asylum as an epileptic, feeble-minded, idiot, imbecile, or insane person is capable of contracting marriage except upon a verified certificate of complete cure, and of there being no probability of the transmission of such person's defects to the issue of the proposed marriage. The marriage of any such person without such certificate is made a felony. Marriages of persons who are insane at the time of the marriage are void.

Minnesota. Marriages of persons who are epileptic, imbecile, feeble-minded, or insane are criminal, except where the person so afflicted is a woman of 45 years of age.

Nevada. Marriages are voidable where either party is incapable, for want of understanding, of assenting thereto, unless there is a voluntary cohabitation after such incapacity is removed.

New Jersey. A marriage contracted with an epileptic, insane or feeble-minded person who has not recovered is criminal. Any person who has been confined in any public asylum or institution as an epileptic, insane, or feeble-minded person is prohibited

from marriage except upon a medical certificate that he or she has been completely cured of such disease and that there is no probability that such person will transmit any such defects or disabilities to the issue of the proposed marriage.

New York, *North Carolina*, *Oklahoma* and *Oregon*. Marriages where either party is incapable of consenting for want of understanding are voidable; such marriages are void from the time their nullity is declared by a court of competent jurisdiction.

Ohio. Marriage is prohibited where either of the parties is an epileptic, or an insane person, or an imbecile, or an idiot.

Vermont. Marriages in which either party is an idiot or lunatic are voidable, unless after the restoration of such person to reason the parties voluntarily cohabited.

Virginia and *West Virginia*. Marriages of insane persons are voidable; such marriages are declared to be void from the time they shall be so declared by a decree of divorce or nullity.

Washington. Marriages of epileptics, imbeciles, feeble-minded, idiots, or of insane persons, or of persons who have theretofore been afflicted with hereditary insanity are prohibited, unless the woman be over 45 years of age.

Wisconsin and *Wyoming*. No insane person or idiot shall be capable of contracting a marriage; marriages of insane persons or idiots are void.

It will be observed that in each of the eighty-six states whose marriage laws relating to insanity are set out above, the marriage of lunatics is either (i) prohibited, or (ii) declared to be void, or (iii) is voidable at the option of those persons who are interested. In Connecticut, Michigan, Minnesota and in New Jersey the State has made it a criminal offence for a feeble-minded person to contract marriage.

It will be observed also that while the law of England

declares by Statute (a) marriage with a lunatic so found by inquisition to be null and void, even though celebrated during a lucid interval, and that in the case of a lunatic not so found the marriage is void *ab initio* (b), the law of many foreign countries, particularly that of several of the United States of America, extends the prohibition against, or the declaration of invalidity of marriages to, persons who are epileptic as well as to those who are feeble-minded.

Breach of Promise of Marriage.

From the considerations set out above, it would seem that a lunatic cannot be made legally responsible for damage (actual or sentimental) caused through his or her failure to complete a contract of marriage owing to his or her insanity, whether the disability existed at the time of the betrothal or occurred subsequently thereto.

In the first case (*i.e.*, where insanity existed at the time of the betrothal) there could be no contract owing to the absence of consent, and, in the second case (*i.e.*, where insanity occurs subsequently to the betrothal), the contract is void through impossibility of performance, owing to the incapacity of the lunatic to enter into the marriage relation.

According to a case reported in *The Times* newspaper on 14th February, 1896, the defendant in an action for breach of promise of marriage who relies for his defence upon unsoundness of mind at the time of the promise must show, not only that he was incapable of making the promise, but that the other party was aware of the fact. Even if, however, these facts be not established, the defendant will be entitled to judgment if it be proved that he was incapable at the time fixed for the performance of the promise,

(a) 51 Geo. III., c. 37.
(b) *Hancock v. Peaty*, Supra. *Harford v. Morris*, Supra.

unless he have committed the breach complained of while he was sane.

The statement that the defendant's insanity must have been known to the plaintiff is beside the point and is based on the unsatisfactory decision in *The Imperial Loan Co. v. Stone* (a) which it is submitted is contrary to authority (see Chapter III) and repugnant to the fundamental principle of the law of contract that there must be on the part of *both* parties a *consensus ad idem*.

In the Scotch case of *Liddell v. Easton's Trustees* (b), the opinion was expressed by the Lord Justice-Clerk that a breach of promise to marry is justifiable where the man becomes insane after making the promise.

The mere facts that a party had, prior to making a promise of marriage, been insane, and had been confined in an asylum, is in itself no answer to an action in which damages are claimed for a subsequent breach of the promise (c).

Restitution of Conjugal Rights.

A plea of insanity in the petitioner and of threatened danger to the respondent as a result of the insanity is not an answer to a petition for the restitution of conjugal rights. A husband is not entitled to turn his lunatic wife out of doors merely because she is suffering from insanity. He may be bound rather to place her in proper custody and under proper care and treatment. In *Hayward v. Hayward* (d) the husband met a claim on the part of the wife for the restitution of conjugal rights by a plea alleging her insanity and certain acts which threatened him with danger in the future. The wife denied the allegation of insanity, but she did not explicitly deny the acts

(a) Supra.
(b) (1907) S.C. 154.
(c) *Baker v. Cartwright*, 30 L.J., C.P. 364.
(d) 1 Sw. & Tr., 81.

alleged. If the wife had been proved to have been insane, the acts would have been immaterial; while, on the other hand, if she had not been insane, her acts would have barred the relief sought. In these circumstances, the Court solved the difficulty by assuming that the acts also had been denied by the wife.

Nevertheless, while the insanity may be shown to be such as to render cohabitation unsafe, withdrawal from cohabitation is not the proper remedy for it (a).

(a) *Radford v. Radford*, 20 L.T. N.S. 279.

CHAPTER V

Supervening Insanity and Divorce

Where marriage has once been validly contracted, the usual incidents belonging to it attach and continue notwithstanding the *subsequent* insanity of either party: that is to say, supervening insanity *of itself* will not operate as a dissolution of the bond, nor afford a ground for a decree of dissolution of the marriage, or of judicial separation (a).

The question whether or not insanity arising during the marriage state will, in any circumstances, be a defence to charges of misconduct was considered in *Hanbury v. Hanbury* (b) where it was held that even if insanity can in any case afford a defence to proceedings for divorce, it is necessary that the plea should state that the insanity is *lasting and abiding* and that there is no hope of recovery or amelioration, and that it is not a mere recurrent or intermittent insanity. Where a husband, who returned to the conjugal home after a period of confinement in an asylum, was subject to fits of mania which endangered the safety of the wife, it was held that she was entitled to the protection of the Court by the grant of a judicial separation. The decision in *Hanbury v. Hanbury* was based on the fact that at the time the respondent committed certain acts of cruelty and adultery he was capable of understanding their nature and consequences, the jury having been satisfied, especially on the evidence of Dr. Henry Maudsley,

(a) *Hayward v. Hayward*, 1 Sw. & Tr. 81; *Hall v. Hall*, 3 Sw. & Tr. 347.
(b) (1892) P. 222.

that the insanity was intermittent: in these circumstances the Court granted the wife a *decree nisi*.

In this connexion it is necessary to bear in mind that the misconduct complained of must be the consequence of the insanity (a).

In *Yarrow v. Yarrow* (b) it was held that where a married woman who had admitted having committed adultery was subsequently sought to be divorced by her husband, the guardian *ad litem* (who was appearing for the wife who was at the date of the action detained in a lunatic asylum) opposed the petition on the ground that the wife was insane at the time of the adultery. In the opinion of the Court the defence of insanity was not allowable, inasmuch as, although the wife may have had certain delusions and was not absolutely of sane mind, she was quite capable, at the date of the adultery, of appreciating the character of her acts and the probable consequences thereof, *i.e.*, that a petition would be brought for her divorce. In these circumstances, the husband's petition was granted. The decision in this case depended entirely upon the degree of the insanity. The President of the Court said that he was by no means sure that if the respondent were suffering from insanity of such a degree as would entitle an accused person to acquittal on an indictment for a crime, such insanity would constitute a valid defence to a suit for divorce on the ground of adultery.

As to the legal effect of insanity of one of the parties to the hearing of a petition for divorce on the ground of adultery, reference may usefully be made to the important case of *Mordaunt v. Moncreiffe* (c) where it was held unanimously by the House of Lords that insanity on the part of the respondent is no bar to proceedings for divorce and

(a) *White v. White*, 1 Sw. & Tr. 592; *Curtis v. Curtis*, 1 Sw. & Tr. 192.
(b) (1892) P. 92.
(c) 2 H.L., L.R., Sc. & D. 374.

that the respondent's defence should be conducted by a guardian *ad litem*. The case is interesting by reason of the fact that the House of Lords obtained the opinions of the judges upon the important question of principle which was raised. The *ratio decidendi* was that if the petitioner were prevented from having his petition heard, the effect would be that insanity would of itself be a defence to a charge of adultery and that this was clearly not the intention of the Divorce Act, which directed the Court, upon the petition of the husband in cases of adultery committed by the wife, to pronounce a decree declaring the marriage to be dissolved. The House of Lords refused to allow the insanity of the respondent to bar or to impede the investigation of the charge of adultery brought by the petitioner, and sent the case back with directions to proceed notwithstanding the insanity of the respondent.

In *Hanbury v. Hanbury* (a) the President of the Divorce Court (Sir Charles Butt) stated that the object of the Divorce Act is not so much the punishment or retribution for a marital offence as the protection of the party in peril. On this principle, if it can be shown that the insanity of the husband is of such a nature as to endanger the safety of the wife she is entitled to the protection of the Court. Sir Charles Butt stated also that the law does not entitle a woman in such a case to have her marriage dissolved, but that he would be disposed to hold that acts of cruelty committed in a fit of mania would entitle a wife to be legally separated from her husband.

On the question whether insanity of so pronounced a degree that the party has to be confined in an asylum or in some other place of permanent detention, and the disease is such that there is no hope of recovery or amelioration such as will allow of the patient's discharge will be a good defence to a petition

(a) Supra.

for divorce on the ground of adultery with cruelty, there is no doubt, since the decision in *Hanbury v. Hanbury* (a), that if the act complained of be committed during such insanity, the marriage will not be dissolved. Sir Charles Butt said :—" When a disease of mind of so pronounced a type seizes upon a person and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that in regard to an act committed in such a state of insanity a plea of insanity might not be an answer."

The Law of England is that the insanity, even of an incurable type, *e.g.*, general paralysis of the insane, of either a husband or wife, does not, *ipso facto*, entitle the other party to a divorce or even to a judicial separation. *Divorce* will not in any circumstance be granted upon the ground merely of the insanity of one of the parties ; and *judicial separation* will be granted only in circumstances similar to those set out above.

The hope or expectation which operates or has been operating in the mind of a husband, whose wife has become insane after having committed adultery, that he may be released from the marriage by the death of his wife, may be accepted by the Court as a valid excuse for, or explanation of, what would otherwise amount to " unreasonable delay " in filing his petition for a divorce (b).

With reference to the foregoing statement of the law of England as to supervening insanity as a ground for divorce, consideration may usefully be given to :—

(1) The following recommendation of the Royal Commission on Divorce and Matrimonial Causes with reference to the question of insanity as a ground for divorce :—

That insanity should be introduced as a ground for

(a) Supra.
(b) *Johnson v. Johnson.* (1901) P. 65.

divorce subject to the following limitations and conditions :—

(i) The insanity which should form a ground for divorce should be certified as incurable, and

(ii) The insane spouse should have been continuously confined, under the provisions of the Lunacy Acts for the time being in force, for not less than five years.

(iii) The insanity should be found to be incurable to the satisfaction of the Court.

(iv) This ground should operate only when the age of the insane person is, if a woman, not over fifty years, and if a man, not over sixty years.

(2) A summary of the laws of ninety-one other countries relating to insanity as a ground for divorce.

British Dominions.

Scotland. Insanity is not a ground for divorce.

Ireland. The only way by which divorce may be obtained in Ireland is by private Act of Parliament : insanity is not allowed to be a ground for the passing of such an Act.

Isle of Man. Insanity is not a ground for divorce.

Channel Islands. The Courts have no power to grant divorce.

British India. (i) Insanity is not a ground for divorce among the Christian communities in India—to whom alone the Indian Divorce Act of 1869 applies.

(ii) Under the *Mahommedan Law* a husband may divorce his wife without any misbehaviour on her part, or without assigning any cause.

(iii) Divorce, in the ordinary sense, is unknown to the *Hindu Law* : the Hindus contend that even death does not dissolve the bond of marriage.

Dominion of Canada. In none of the provinces is insanity a ground for divorce.

Union of South Africa. In none of the provinces is insanity a ground for divorce.

Newfoundland. There is no Court in the colony which has jurisdiction to pronounce a divorce.

New South Wales. Insanity is not a ground for divorce.

Dominion of New Zealand. By the Divorce and Matrimonial Causes Act, 1908 (No. 50 of the Consolidated Statutes of New Zealand), whether the petitioner is husband or wife, divorce may be obtained on the ground that the respondent is a lunatic or person of unsound mind and has been confined in an asylum or other institution or house in accordance with the provisions of the "Lunatics Act, 1908," for a period or periods not less in the aggregate than ten years, within twelve years immediately preceding the suit and is unlikely to recover.

Queensland. Insanity is not a ground for divorce.

South Australia. Insanity is not a ground for divorce.

Tasmania. Insanity is not a ground for divorce.

Victoria. Insanity is not a ground for divorce.

Western Australia. By Act No. 7 of 1912, among the causes upon which a decree of divorce may be granted is the fact that the respondent is a lunatic or person of unsound mind, has been confined in an asylum or other institution in accordance with the provisions of the Lunacy Act of 1903 for a period or periods not less in the aggregate than five years within six years immediately preceding the suit, and is unlikely to recover.

Foreign Countries.

Argentine Republic. There is no absolute divorce on any grounds.

Austria. Insanity subsequent to marriage is not a ground for divorce.

Belgium. Insanity subsequent to marriage is not a ground for divorce.

Bulgaria. Insanity subsequent to marriage is not a ground for divorce.

Brazil, *Cuba* and *Mexico*. Absolute divorce is not obtainable.

China. Insanity subsequent to marriage is not in itself a ground for divorce.

Denmark. An administrative divorce may be obtained on the ground of supervening insanity.

France. Insanity subsequent to marriage is not a ground for divorce.

The German Empire. By the German Civil Code of 1900 insanity of three years' duration after the marriage is an absolute ground upon which a decree for divorce is granted throughout the German Empire.

Greece. Insanity is not a ground for divorce.

Holland and *Hungary*. Insanity is not a ground for divorce.

Italy. No divorce is permitted upon any grounds.

Japan and *Luxemburg*. Insanity is not a ground for divorce.

Norway. Either party to marriage is entitled to a divorce where, at the time of marriage, the other party, without the knowledge of the former has suffered from insanity. Insanity for three years with no reasonable prospect of recovery is also a ground for divorce.

Portugal. Divorce may be obtained upon proof of incurable lunacy three years after the date upon which insanity has been declared by the competent authorities.

Peru, *Roumania* and *Serbia*. Insanity is not a ground for divorce.

Russia. Members of the Lutheran Church (other

than those resident in Finland) may seek divorce in their Consistorial Courts upon the ground of the insanity of one of the parties to the marriage.

Spain. No divorce is permitted.

Sweden. One of the grounds for divorce is insanity of three years' duration which is pronounced incurable.

Switzerland. By the Civil Code of December, 1907, divorce may be obtained upon proof of insanity of a nature such as to render married life unbearable, and which, after three years' duration, is pronounced incurable.

United States of America.

Alabama, *Arizona*, *California*, *Colorado*, *Connecticut*, *Delaware*, *District of Columbia*, *Georgia*, *Illinois*, *Indiana*, *Iowa*, *Kansas*, *Kentucky*, *Louisiana*, *Maine*, *Maryland*, *Massachusetts*, *Michigan*, *Minnesota*, *Mississippi*, *Missouri*, *Montana*, *Nebraska*, *Nevada*, *New Hampshire*, *New Jersey*, *New Mexico*, *New York*, *North Carolina*, *Ohio*, *Oklahoma*, *Oregon*, *Rhode Island*, *South Dakota*, *Tennessee*, *Texas*, *Vermont*, *Virginia*, *West Virginia*, *Wisconsin*, and *Wyoming*. Insanity occurring after the marriage is not a ground for divorce.

Arkansas. By an act approved on 28 March, 1895, the following ground for divorce was repealed: —"Where either party shall, subsequently to marriage, have become permanently or incurably insane."

Florida. On 25 April, 1901, a statute was enacted making incurable insanity for four years in either party a ground for absolute divorce. This statute was repealed on 11 May, 1905.

Idaho. By a statute of 4 February, 1895, permanent insanity is a ground for divorce: the insane person must have been duly and regularly confined in an asylum of a state for at least six years next preceding the commencement of the action for divorce,

and such insanity must appear to the Court to be permanent and incurable.

North Dakota. By an act approved on 6 March, 1899, incurable insanity after two years' duration was made a ground for divorce: this was repealed on 15 February, 1901.

Pennsylvania. The husband may obtain an absolute divorce when the wife is a lunatic or *non compos mentis* and the petition is brought by any relative or next friend of the wife.

South Carolina. No divorce is allowed.

Utah. By an act approved on 9 March, 1903, permanent insanity of one of the parties is a ground for divorce, provided that the party shall have been duly and regularly adjudged insane by the legally constituted authorities of Utah or of some other State at least five years prior to the commencement of the action, and that it shall appear to the satisfaction of the Court that the insanity is incurable.

Washington. Absolute divorce may be granted in the discretion of the Court where either party is proved to have suffered for ten years or more from incurable chronic mania or dementia.

A survey of the foregoing statement shows that the laws of several foreign non-Catholic countries, as well as those of New Zealand and of Western Australia, evince a tendency to regard the contract of marriage as voidable upon proof of the confirmed insanity of one of the parties. In at least three of the North American States the Legislature has repealed, after a short trial, Acts which made the supervening insanity of one of the parties a ground for divorce. If, as is proposed by the Royal Commission on Divorce, supervening insanity be made a ground for divorce in England, it would seem to be necessary, according to the principles of the law of contract, to alter the conditions which are commonly inserted in the contract of marriage. It may be

inconsistent with public policy for the Legislature arbitrarily to introduce into a contract of the solemn nature of marriage and to make retrospective a condition which was not contemplated by either of the contracting parties at the date of the marriage.

CHAPTER VI

Testamentary Capacity in Mental Deficiency

In many civilised countries the law concedes to every person the right of determining, by his last will, to whom the property which he leaves behind him shall pass. Nevertheless, although the law leaves to a person much freedom in the disposition of his property, it has been rightly observed that "a moral responsibility of no ordinary importance attaches to the exercise of the right thus given" (a) The instincts and affections of mankind, in the majority of instances, will lead men to make provision for those who are the nearest to them in kindred and for those who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of those of a man's kindred who survive him, that upon his death, his property shall become theirs instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of relatives is to shock the common sentiments of mankind and to violate what all men concur in regarding as a moral obligation. It cannot be supposed that, in giving the power of testamentary dispositon, the law has been framed without regard to these considerations:

(a) *Banks v. Goodfellow*, L.R. 5 Q.B. 549.

on the contrary, if they had stood alone, it is probable that the power of testamentary disposition would have been withheld altogether and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. There are, however, other considerations which turn the scale in favour of the testamentary power. Among those who, as a man's nearest relatives, would be entitled to share the property which he leaves behind him, some may be better provided for than others, some may be more deserving than others: while some, either through age, or sex, or physical or mental infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims which ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct paternal authority finds a useful auxiliary, and age secures the respect and attentions which are one of its chief consolations. For these reasons the power of disposing of property in anticipation of death has always been regarded as one of the most valuable of the rights incidental to the ownership of property: while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth and to thrift and frugality in the enjoyment of it (a).

The law of every civilised country, therefore, has conceded to the owner of property the right of disposing by will of the whole, or, at all events, of a portion, of that which he possesses. The Roman Law, and the law of those European nations which have followed it, have secured to the lelatives of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English Law, on the other hand, leaves everything to the unfettered discretion of the testator, on the assumption that, although in some instances caprice, or

(a) *Banks v. Goodfellow.* Supra.

passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims which ought to be regarded, yet the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

The absolute and uncontrolled power of testamentary disposition conceded by the law is founded upon the assumption that a rational will is a better disposition of a man's property than any which can be made by the law itself.

As a logical complement to the unfettered discretion allowed to a testator in the disposal of his property after his death, the English Law insists, as an indispensable condition, upon the possession by the testator of the intellectual and moral faculties which are commonly enjoyed by mankind.

In determining whether or not a testator at the time of making his will was possessed of testamentary capacity, the Court is influenced by the following considerations :—There must be, on the part of the testator (1) a sound mind as well as a memory which is able to recall the several persons who may be fitting objects of the testator's bounty, and (2) an understanding to comprehend the relationship of the beneficiaries to himself and their respective claims upon him. By the expression " sound mind " the law does not mean a perfectly balanced mind, because, if this were so, no one would be competent to make a will. The law does not say that a man is incapacitated from making a will if he propose to make a disposition of his property while under the influence of capricious, frivolous, mean, or even wrongful motives. According to the law of England

(which differs in this respect from the law of many other countries), everyone is left free to choose the person upon whom he will bestow his property after death, and he is entirely unfettered in the selection he may think proper to make. In order to gratify his spite, he may disinherit his children either wholly or partially and leave his property to strangers, or he may leave it to charities in order to gratify his pride. The business of the Courts in any case which comes before them is to give effect to the expression of the true mind of the testator, and this involves a consideration of what is the amount and quality of intellect which is requisite in order to constitute testamentary capacity. In recent cases, the Courts have admitted with some degree of freedom the evidence of lunacy experts, *e.g.*, in the Marquis of Townshend's case, Sir Robert Armstrong-Jones, M.D., F.R.C.P., the Medical Superintendent of Claybury Mental Hospital, was called upon to examine a litigant who was alleged to be insane.

The strict legal view was expressed by Sir J. Hannen when delivering judgment in *Boughton v. Knight* where he said:—"The question of testamentary capacity is eminently a practical one in which the good sense of men of the world is called into action, and it is one which does not depend solely on scientific or legal definition" (a).

The difficulty of laying down any legal rules as to testamentary capacity was appreciated by Lord Cranworth, who, in *Boyse v. Rossborough* (b) used the following words:—"On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idiot in saying that he is not a person capable of disposing of property: but between such an extreme case and that of a man of perfectly sound and vigorous

(a) L.R. 3 P. & D. at. p. 67. (b) 6 H.L.C. at. p. 45.

understanding there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking mid-night for noon, but at what precise moment twilight becomes darkness is hard to determine." Hence, in considering this important question of degree, the law makes considerable allowance for the difference of individual character; it disregards eccentricities of manner, of habits of life, of amusements, of dress, and so on. The law is not satisfied to apply the layman's test of whether or not the testator is very different from other men, but it applies the general test:—Was the testator, *at the time of making the will*, labouring under delusion? Sir J. Nicholl in *Dew v. Clark and Clark* (a) says that a person is under a delusion when he once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination, and wherever at the same time, having so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception.

On the assumption that a man would naturally dispose of his property by will for the benefit of his children unless there existed good reason for his doing otherwise, the law has always been willing to investigate the suggestion of a testator's insanity made by children or other near relatives who have been disinherited for no apparent reason. *Dew v. Clark and Clark* (b) affords a good illustration of this point. In that case the testator took a long, persistent dislike to his only child, a daughter, who, upon the testimony of all who knew her, was worthy of all love and admiration, and for whom the father entertained, so far as his nature would allow, the warmest affection: but his affection took an extraordinary form: he desired that his child's mind should be subjected entirely to his and that (*inter alia*) she should confess her faults to him: and because the child did not

(a) 3 Add. Eccl. 79. (b) Supra.

fulfil his desires and hopes in that respect, he treated her as a reprobate and an outcast. In her youth he treated her with great cruelty. He beat her, he used unaccustomed forms of punishment, and he continued throughout his life to treat her as if she were the worst, instead of apparently one of the best, of women. In the end, he left her with so small a legacy that she was virtually disinherited. The testator, who was a medical practitioner, was a man who throughout life had presented to those who met him in the ordinary course of business and of social life the appearance of a rational man, yet, upon the ground that his conduct towards his daughter could be explained only by the existence of insanity, the will was set aside and the property distributed as upon an intestacy.

In other words, it is essential to the exercise of the power of making a will that the testator shall be suffering from no disorder of the mind which would poison the affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his mind in disposing of his property in such a way as, if the mind had been sound, would not have been done. This is the measure of the degree of mental power upon which the law insists. If, however, the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment be lost, and the mind become a prey to insane delusions calculated to interfere with and to disturb its functions and to lead to a testamentary disposition due only to their baneful influence, in any such case the condition of testamentary power fails, and a will made in such circumstances will not be allowed to stand.

Thus, in a Probate action where the sanity of the testator is in question, the issue is whether or not the testator was of a sound and disposing mind; in

other words, the fact to be determined is whether or not the testator was able at the time of making his will to understand the nature of the act and its effect, the extent of the property of which he was disposing, and the claims to which he ought to give heed (a).

It may be observed that the will of an idiot is void: so also is that of a deaf mute, (who in presumption of law is an idiot) (b): but this latter presumption may be rebutted by evidence that, though deaf and dumb, the testator was of sound mind and of testamentary capacity (c).

According to Swinburne, the general rule is that the will of a lunatic made during his insanity is void (d); thus, where a person of unsound mind purported to make a will, letters of administration were granted as if he had died intestate (e); but, in this absolute form, it will be seen that Swinburne's statement is not an exact account of the law upon this important matter.

It was held, however, in a recent case that the will of a lunatic (whether he be so found or not) made during a lucid interval is valid (f).

It is interesting to note that in 1810 the Prerogative Court of Canterbury held that, in order that a will should be valid, it is essential that the testator should understand the precise nature of the act and its effect, and that no insane delusions should dominate his mind so as to overmaster his judgment to such an extent as to render him incapable of making a reasonable and proper disposition of his property, or of taking a rational view of the matters to be considered in making a will. Moreover, it was held to be necessary that the sound and disposing mind and memory

(a) *Banks v. Goodfellow.* Supra.
(b) *In the Goods of Owston.* 2 Sw. & Tr. 461.
(c) *Dickenson v. Blisset.* 1 Dick. 268.
(d) *Swinburne on Wills.* Part II. s. 3.
(e) *In the Goods of Rich* (1892) P. 143.
(f) *In re Walker.* (1905) 1 Ch. 160.

should exist at the actual moment of the execution of the will (a). The modern view of the meaning to be placed upon the words "sound and disposing mind" is considered below.

In an action heard in 1812 it was held that where a will was executed in two parts and the testator was proved to be insane at the date of the execution of the second part, the first part was valid, but the second part invalid, inasmuch as the requirements of the law as to testamentary capacity had been complied with in the execution of the first but not in that of the second part (b).

In all cases where the sanity of a testator is in question, either parol or documentary evidence will be admitted to show that the will expresses the deliberate intention of the testator. All statements, both verbal and in writing, of a testator preparatory to making a will, as well as his conduct generally in regard thereto, are of importance with a view to showing whether or not the testator was in fact aware of the nature of the act which he was performing (c).

A will executed during insanity does not become valid upon the subsequent recovery of the testator. However much he may wish his will to stand, the testator cannot ratify it upon recovering his sanity: he must execute another will in which he should, for safety's sake, revoke all previous wills (d).

A holograph will affirmed and delivered by a testator affords strong evidence of his capacity to make a will (e). Although the evidence of an attesting witness impeaching the validity of the will is admissible, it must be received with great caution,

(a) *Billingshurst v. Vickers.* 1 Phillim. 187.
(b) *Brouncker v. Brouncker*, 2 Phillim. 57.
(c) *Hall v. Warren*, 9 Ves. 605; *Wheeler v. Alderson*, 3 Hag. Ecc. 574; *Durling v. Loveland*, 2 Curt. 225.
(d) *Arthur v. Bokenham*, 11 Mod. Rep. 148.
(e) *Cartwright v. Cartwright*, 1 Phillim. 90.

inasmuch as he thus impeaches his own act (a): corroboration by other evidence is necessary before weight can be attached to such evidence (b).

On the same principle as that upon which the law requires strong evidence of full capacity on the part of the testator where there exists between him and the beneficiary under the will certain intimate or confidential relations, (*e.g.*, medical man and patient; parent and child; guardian and ward; spiritual adviser and penitent; legal adviser and client). Even stronger proof of testamentary capacity is required where there appears to the Court to exist in the testator some mental weakness which, although not amounting to absolute incapacity, renders him liable to be unduly influenced by those around him (c).

Partial Insanity.

Before proceeding to consider the difficult question of partial insanity, it should be stated that in the opinion of an eminent judge (Sir J. Hannen), "the highest degree of mental soundness, if degrees there be, is required by the law in order to constitute capacity to make a testamentary disposition, because, from the nature of the act, it requires the consideration of a larger variety of circumstances than is required in other acts, *e.g.*, in contracts of buying and selling and in marriage, for it involves reflection upon the claims of several persons, who, by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and it involves also the power of considering these several claims and of determining in what proportion the property shall be divided among the claimants" (d). This dictum is representative of the old doctrine of

(a) *Boolle v. Blundell*, 19 Ves. 494.
(b) *Kinleside v. Harrison*, 2 Phillim. 449.
(c) *Mountain v. Bennet*, 1 Cox. Eq. Cas. 353.
(d) L.R. 3 P. & D. at p. 68.

the oneness and indivisibility of the mind which is considered below.

It is interesting and instructive at this stage to consider the rules relating to testamentary capacity obtaining in other systems of law, to which attention was drawn in *Banks v. Goodfellow* (a).

The *Roman Law*—the great storehouse of juridical science—is vague and general. The madman (*furiosus*) and the person of defective intelligence (*mente captus*) are declared incapable of making a testament; but the authorities are silent as to what constitutes madness or defectiveness of intelligence sufficient to prevent the exercise of the testamentary right.

The Continental codes are equally general in their terms, merely providing either that persons must be of sound mind to make a will, or that persons of unsound mind shall be disabled from doing so. It seems, moreover, that the older writers appear not to have been alive to the distinction between partial and total unsoundness of mind as affecting testamentary capacity: more recently, however, the question has been mooted by several eminent and distinguished jurists, but with a marked discordance of opinion.

M. Troplong, the author of "*Le Droit Civil Expliqué*," in a section entitled "*Commentaire sur les donations entre vifs et testaments*"; and M. Lacase, in a treatise entitled "*La Folie considérée dans ses rapports avet la Capacité' Civile*" have both adopted the doctrine of the unity and indivisibility of the mind and the consequent unsoundness of the whole mind if insane delusion exist anywhere. On the other hand, equally distinguished writers have maintained the contrary view. Thus Legrand du Saulle, in a very able work entitled "*La folie devant les tribunaux*" contends that "hallucinations are not a sufficient obstacle.

(a) Supra.

to the power of making a will if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfilment of his social and domestic duties: while, on the other hand, the will of a person affected by insane delusion ought not to be admitted if he have disinherited his family without cause, or looked upon his relatives as enemies, or accused them of seeking to poison him, or the like. In all such cases, where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails: the will of the party is no longer under the guidance of reason: it becomes the creature of the insane delusion." Three other jurists of eminence, *viz.*, M. Demolombe in the "*Cours de Code Napoléon*," M. Castlenau in his treatise "*Sur l'Interdiction des Aliénés*," and Hoffbauer in his work on *Medical Jurisprudence relating to Insanity*, have maintained the doctrine that monomania, or partial insanity not affecting the testamentary dispositions, does not take away the testamentary capacity.

Mazzoni, in his work entitled "*Instituzione di diritto civile Italiano*" lays it down that "monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity, as the monomaniac may have the perfect exercise of his faculties in respect of all subjects beyond the sphere of the partial derangement."

In the opinion of many legal and forensic-medical authorities the power of testamentary disposition should not be abrogated, in spite of the existence of mental disease, unless the insanity be general, or of such a nature that it manifestly incapacitates the testator from making a rational will. In other words, modern science has shed so much light upon the true nature of insanity that the old doctrine of the oneness and indivisibility of the mind is no longer regarded by pathological-psychologists as satisfactory

where any question has been raised as to the capacity of the testator.

The modern view of the effect of insanity upon testamentary disposition is that partial unsoundness of mind, not affecting the general faculties and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. Thus, at a trial as to the validity of a will in favour of the testator's niece it appeared that the testator made the will in 1863; that he had been under treatment as a lunatic for some months in 1841, and that he remained subject to delusions that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present. These delusions were shown to have existed between 1841 and the date of the will, and also between that date and his death in 1865. The evidence as to the testator's general capacity to manage his affairs was contradictory, but it was admitted that at times he was quite capable of making a will. The Court of Appeal held that the judge was right in directing the jury to consider whether, at the time of making the will, the testator was capable of having such knowledge and appreciation of facts, and was free from delusions to such an extent as would enable him to have a will of his own in the disposition of his property and to act upon it: further, that the mere fact of the testator's being able to recollect things or to converse rationally on some subjects, or to manage some business, would not be sufficient to show that he was sane: while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to show that he was insane (a).

The question as to how far the existence of mental delusions upon a particular matter affects testa-

(a) *Banks v. Goodfellow.* Supra.

mentary capacity was considered also in *Boughton v. Knight* (a) where it was held that a man moved by capricious, frivolous, mean, or even bad motives, may disinherit his children and leave his property to strangers: that he may take an unduly harsh view of the character and conduct of his children. But the law places a limit beyond which such action will cease to be regarded as a question merely of harsh, unreasonable judgment, and beyond which limit the repulsion which a parent exhibits to his own child will be assumed to proceed from some mental defect.

In this connexion an English authority on lunacy says:—"It is well known to those who are conversant with the insane that in persons who are considered as labouring under monomania the mind is otherwise disordered and weakened, though the characteristic illusion is the most striking phenomenon. The social affections are either obliterated or perverted: some ruling passion seems to have entire possession of the mind, and the hallucination is in harmony with it and seems to have had its origin in the intense excitement of the predominant feeling: there is always a selfish desire or apprehension and the illusory ideas relate to the personal state and circumstances of the individual. In most cases of exclusive or partial mental illusion the persons afflicted are abstracted, absent, incapable of applying themselves to any occupation, or even of reading with attention: they either forget the objects of their strongest attachment, or, if they think of them at all, it is only to accuse them of injustice and cruelty on the most frivolous pretexts, or the most improbable suspicions" (b).

From an examination of the English Law Reports

(a) 3 P. & M. 64.
(b) Dr. J. C. Prichard in "Insanity in Relation to Jurisprudence," Section VII. p. 69.

there appears to be no doubt that an ordinary lunatic, *i.e.*, one who is deficient in his general faculties, does not possess testamentary capacity. The question whether partial unsoundness of mind not affecting the general faculties and not operating upon the mind of a testator in regard to the particular testamentary disposition in question is sufficient to deprive a person of the power of disposing of his property, presented itself for judicial decision for the first time in *Banks v. Goodfellow* (a). In this case the Court repudiated the old doctrine of the oneness and indivisibility of the mind which was enunciated in *Waring v. Waring* (b) and followed in *Smith v. Tebbitt* (c), *viz* :—that *any* degree of mental unsoundness must be fatal to the capacity of a testator.

In *Smith v. Tebbitt* it was held that, if disease be shown once to have existed in the mind of a testator, notwithstanding that it is discoverable only when the mind is addressed to a certain subject to the exclusion of all others, or that the subject on which it is manifested has no connexion whatever with the testamentary disposition before the Court, the testator must be pronounced incapable. It was decided also that a diseased state of mind, once proved to have established itself, will be presumed to continue, and that the *onus* of showing that health has been restored falls upon those who assert it. It appeared from the judgment of Sir J. P. Wilde that the question of insanity is a mixed one, partly within the range of common observation and partly within the range of special experience, and it is the duty of the Court, in searching for a conclusion, to inform itself of the general results of medical observation, and to make a comparison between the sayings and doings of the testator at the time when the disease is alleged to exist and, (i) his sayings and doings at a time when

(a) Supra. (b) 6 Moo. P.C. 341.
(c) (1867) 1 P. & D. 398.

he was sane, or the sayings and doings of those sane persons whose general temperament and character bear the closest resemblance to his own : and (ii) the sayings and doings of insane persons (a).

In *Smith v. Tebbitt* (b) the argument used was as follows : the Law of England permits a large exercise of volition in the disposal of property after death, but it requires, as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness, or tainted by morbid influence. Such a mind is known to the law as a " sound and disposing mind." Consequently, it was argued, if the mind be disordered in any one faculty, if it labour under any delusion arising from such disorder, though its other faculties and functions remain undisturbed, it cannot be said to be sound : such a mind is consequently unsound, and testamentary incapacity is the inevitable result.

It is instructive to set out briefly the decisions in the leading cases prior to *Waring v. Waring* and to *Smith v. Tebbitt*, in which the law on the subject of mental unsoundness as affecting the capacity to make a will has been considered.

(i) *In Combe's case* (c) the judges agreed that " sane memory for the making of a will is not always where the party can in some things answer with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the will is void."

(ii) *In the Marquis of Winchester's case* (d), it was decided that by the law it is not sufficient that the testator be of memory, when he makes the will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason.

(a) 1 P. & D. at. p. 400 et seq. (b) Supra.
(c) Moore. 759. (d) 6 Rep. 23.

(iii) *In Greenwood v. Greenwood* (a) an action was brought to recover estates under a will, the validity of which was disputed, the principal indication of insanity relied upon being a strange aversion on the part of the testator towards his only brother, his heir-at-law, and a groundless suspicion of the latter's having attempted to poison him. Lord Kenyon in charging the jury said:—"I take it a mind and memory competent to dispose of property, when it is a little explained, perhaps may stand thus—having that degree of recollection about him that would enable him to look about the property he had to dispose of and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind so as to know what his property was, then he was competent to make his will."

(iv) *In Dew v. Clark and Clark* (b) the insane delusion had a direct bearing upon the provisions of the will. The details of this case having been given above (p. 132), it is unnecessary to repeat the facts here: it may be observed, however, that in cases of this sort, where the connexion of the delusion with the will is manifest, the Court has been willing to set aside the will.

(v) *In Cartwright v. Cartwright* (c) the will (which had been made by a person who was undergoing treatment in a lunatic asylum and who undoubtedly was insane both before and after the making of the will) was upheld on the ground that it had been made in a lucid interval.

Sir William Wynne, the then judge of the Prerogative Court of Canterbury, in delivering judgment in *Cartwright v. Cartwright*, said that the strongest and

(a) 3 Curt. App., XXX. (b) Supra. (c) Supra.

best proof which can arise as to a lucid interval is that which arises from the act itself: if it can be proved and established that the act is rational and is done in a rational manner the whole case is proved. "In my apprehension," he says, "where you are able completely to establish that a rational act has been rationally done the law does not require you to go further and the following citation from Swinburne states it to be so :—' If a lunatic person, or one that is beside himself at some times, but not continually, make his testament and it is not known whether the same were made while he was of sound mind and memory or not, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions : and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all. Yet, nevertheless, I suppose that if the treatment be wisely and orderly framed, the same ought to be accepted for a lawful testament' (a); Unquestionably there must be a complete and absolute proof that the party who had so framed it did it without any assistance. I do not know of any authority which determines what the length of the lucid interval is to be, whether an hour, a day, or a month. All that is required is that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient (b)."

Whatever may be said for the weight of the authorities cited on the preceding pages, it is clear that in *Waring v. Waring* (c) and in *Smith v. Tebbitt* (d) it

(a) Swinburne ii. s. 3. (b) 1 Phillim. at p. 94.
(c) Supra. (d) Supra.

was held that, in order to constitute testamentary capacity, complete soundness of mind is indispensably necessary: that the mind, though it has various faculties, is one and indivisible: that if it be disordered in any one of these faculties, if it labour under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound, and that such a mind is unsound, and testamentary incapacity is the necessary consequence.

Chief Justice Cockburn in dissenting (in *Banks v. Goodfellow*) from the doctrine enunciated in *Waring v. Waring* expressed himself in these words:—"The pathology of mental disease and the experience of insanity in its various forms teach us that, while on the one hand all the faculties, moral and intellectual, may be involved in one common ruin (as in the case of the raving maniac), in other instances one or more only of these faculties or functions may be disordered while the rest are left unimpaired and undisturbed: that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease, and so far constituting insanity, yet leave the individual in all other respects rational and capable of transacting the ordinary affairs and of fulfilling the duties and obligations incidental to the various relations of life. We readily concede that where a delusion has had, as in the case of *Dew v. Clark and Clark* (a) or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity . . . The question is, whether a delusion thus wholly innocuous in its results as regards the disposition of the will is to be held to have the effect

(a) Supra.

of destroying the capacity to make one . . . It is said, indeed, by those who insist that any degree of unsoundness should suffice to take away the testamentary capacity, that where insane delusion has shown itself it is always possible, and indeed may be assumed to be probable, that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and if existing in a latent and undiscovered form, would be little likely to have any influence on the disposition of the will. . . Where in a given case the jury are satisfied that the delusion has not affected the general faculties of the mind and can have had no effect upon the will we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made in such circumstances should not be upheld. In the case before us two delusions disturbed the mind of the testator—one that he was pursued by spirits; the other that a man long since dead came personally to molest him. Neither of these delusions had, or could have had, any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir-at-law and, therefore, would have taken the property without its being devised to her, was yet rational in this, that it was made in favour of a niece who lived with him and who was the object of his affection and regard. In these circumstances we see no ground for holding the will to be invalid."

It would seem, therefore, that in repudiating in *Banks v. Goodfellow* (a) the doctrine of the oneness and indivisibility of the mind, Chief Justice Cockburn

(a) Supra.

was justified in saying that the doctrine embraced in the judgment in *Waring v. Waring* (a) and in *Smith v. Tebbitt* (b) was wholly unnecessary to the decision and that it was not "concluded by authority," inasmuch as in both cases the insanity was general, *i.e.*, not partial, the delusions being multifarious and of the wildest and most irrational character, indicating clearly that the mind of the testator was diseased throughout.

In *Jenkins v. Morris* (c) it was laid down in unmistakable language that, as a general principle, the rule is that the delusion from which a testator may have been suffering at the date of the execution of the will need not be held fatal even if not wholly unconnected with the subject matter of the testamentary disposition.

The decision in *Banks v. Goodfellow* (a) has been followed by the later and, to some extent, complementary case of *Smee v. Smee* (d) where it was held that a man may be capable of transacting business of a complicated and important nature involving the exercise of considerable powers of intellect and yet be subject to delusions so as to make him unfit to make a will; and that, on the other hand, if the delusions under which a man labours be such that they could not reasonably be supposed to have affected the dispositions made by his will the will would be valid.

An important case on partial insanity was heard by the House of Lords on 17th November, 1919, when it was held that, although the testator was admittedly insane, inasmuch as he was at the date of the execution of the will suffering not from general insanity but from an intermittent delusion which did not prevent him from dealing with his property in a rational manner, he was not incapacitated from making a will merely because he was insane. Lord

(a) Supra.
(b) Supra.
(c) 14 Ch. D. 674.
(d) 5 P. D. 84.

Haldane, in delivering judgment, said that a testator must be able to exercise a rational apprehension of what he was doing, and that he must understand the nature of the act. Whether there was such unsoundness of mind as rendered it impossible in law to make a testamentary disposition was a question of degree. The decision in *Jenkins v. Morris* (a) was referred to with approval (b).

In conclusion, it would appear that, from the leading cases considered, the law of England to-day admits of the rule that *any* form of insanity does not *per se* deprive a man of testamentary capacity: further, that upon the production of sufficient evidence that the nature of the insanity is *not* such that the testator is incapable of *any* juristic act whatever, and that, on the contrary, the testator either made the will during a lucid interval, or was able, in spite of his partial insanity, to understand fully the nature of his act, a will made by such a person of unsound mind shall not be impeached merely on the ground of the partial insanity of the testator.

In other words, in the eye of the law a person suffering from delusions may, in certain circumstances, be capable of making a valid will. Each case has, however, to be dealt with upon its own merits, and the Courts have not attempted to lay down any general rule to be followed in cases of so-called partial unsoundness of mind.

Testamentary incapacity may arise from causes other than but analogous to actual lunacy, *viz.*, from want of intelligence occasioned by defective organization, or by supervening physical infirmity, or by the decay caused by advancing age, as distinguished from mental derangement. In these cases, although the mental capacity may be reduced below the normal standard, power to make a will is not

(a) 14 Ch. D. 674.
(b) *Sivewright v. Sivewright*, "*The Times*" *Newspaper*, 18th Nov., 1919.

abrogated if the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done. Thus, Voet in his Commentary on the Pandects says:—*Non sani tantum sed et in agone mortis positi, seminece ac balbutiente lingua voluntatem promentes, recte testamenta condunt si modo mente adhuc valeant* (a).

In dealing with this aspect of unsoundness of mind. reference may usefully be made to certain decisions in the American Courts. In the case of *Harrison v. Rowen* (b) the presiding Judge of the United States Circuit Court for the district of New Jersey laid down the law in the following words:—"As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged. . . It is not necessary that he should comprehend the provisions of the will in their legal form. . . In deciding upon the capacity of the testator to make his will, it is the soundness of the mind and not the particular state of the bodily health that is to be attended to: the latter may be in a state of extreme imbecility, and the testator may possess sufficient understanding to direct how his property shall be disposed of: his capacity may be perfect to dispose of his property by will, and yet may be very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men at different periods of their lives have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing they find much less difficulty in declaring their intentions than they could in comprehending business in some measure new."

In the case of *Den v. Vancleve* (c) similar language

(a) Lib. 28, tit. 1. S. 36. (b) 3 Wash. 585. (c) 2 Southward, 660.

is used by the Court in the declaration that the law means by the expression "a sound and disposing mind and memory" that a testator need not possess these qualities of the mind in the highest degree. The following words, which appear in the judgment of the Court in *Stevens v. Vancleve* (a), show clearly the view of the American Law on this subject:—"The testator must be possessed of sound and disposing mind and memory. He must have a memory: a man in whom the faculty is *totally* extinquished cannot be said to possess understanding to any degree whatsoever, or for any purpose. But his memory may be very imperfect: it may be greatly impaired by age or by disease: he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted: he may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject of which he may possibly have often thought, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is—are his mind and memory *sufficiently* sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?" The above-stated declaration of the law was adopted by the American Court in the case of *Sloan v. Mitchell* (b) and is there stated to have been approved by Chancellor Vroom in the case as to the will of one Tace Wallace. It appears also to have had the

(a) 4 Wash. 267.
(b) 2 H.W. Green, 563.

sanction of Chancellor Kent in the case of *Van Alst v. Hunter* (a).

This important aspect of testamentary capacity was fully considered by the Judicial Committee of the Privy Council in the case of *Harwood v. Baker* (b) where it was laid down that the standard of capacity in cases of this sort is the capacity on the part of the testator to comprehend the extent of the property to be disposed of and the nature of the claims of those whom he may be including in his will.

The application of the legal presumption as to the revocation of lost wills to cases of testators who become insane subsequently to the execution of the will was considered in *Sprigge v. Sprigge* (c) where it was decided that the presumption that a will which was in a testator's custody up to the time of his death and could not be found after the death had been destroyed by him *animo revocandi* does not apply to a case where the testator became insane after the execution of the will and continued insane until his death. In such a case it was held that, in the absence of evidence as to the date of the destruction, probate should be granted of the contents of the will. Approval was given to the principle laid down in the older case of *Harris v. Berrall* (d) where the testator's action in having torn her will before she became insane was admitted as evidence that she had done this *animo cancellandi*.

(a) 5 Johnson, N.Y. Ch. Rep. 159.
(b) 4 Moo. P.C. 282.
(c) 1 P. & D. 608.
(d) 1 Sw. & Tr. 153.

CHAPTER VII

Evidence of Insanity

In any action where the civil responsibility of an alleged lunatic is in question the judge or jury, as the case may be, must consider the practical question whether or not the party was capable of managing his own affairs in the matter in hand (a).

The law presumes every man to be sane until the contrary is proved. It should be noted, however, that in the case of a will, it is the duty of the executors or of any other person setting up the will to prove that it is the act of a competent testator. For this reason the law requires the sanity of the testator to be proved affirmatively in any case where there exists any dispute or doubt as to the capacity of the testator (b). . . . On the same grounds, where a duly executed will has been revoked the competence of the testator to revoke it must be proved (c).

Where a man has been proved or is admitted to have been insane the law presumes the insanity to continue until it is proved to have ceased. The burden of proving that the lunatic has recovered, or that he had a lucid interval, lies upon the person who alleges it (d); moreover, the law insists that the weight of evidence in cases where recovery of lucid interval is alleged shall be the same as that in cases where insanity is alleged (e). According to Sir

(a) *Mannin d. Ball v. Ball.* Sm. & Bat. 183; *Jenkins v. Morris*, 14 Ch. Div. 674.

(b) *Harris v. Ingledew*, 3 P. Wms. 91. 93. *Smee v. Smee*, 5 P. D. 84.

(c) *Sprigge v. Sprigge*, L.R. 1 P. & D. 608. *Benson v. Benson*, L.R. 2 P. & D. 172.

(d) *Waring v. Waring*, 6 Moo. P.C.C. 34.

(e) A-G. *v. Parnther*, 3 Bro. C.C. 441.

William Blackstone (a), although an idiot is presumed to be incurable, insanity is always presumed to be curable (b). In accordance with the presumption that insanity is deemed to be curable until the contrary is proved, in cases where sufficient medical evidence is adduced to show that the lunatic cannot recover, the Court will deal with the lunatic's property for the benefit of persons other than the lunatic in a manner different from that in which it would have been dealt with if there had been any prospect of recovery (c).

The Court of Appeal has expressed the opinion that this practice ought to be narrowed rather than to be extended. In the case in point the Court refused to grant an application made for an order directing an allowance to be made out of a lunatic's property to relatives for whom he was under no legal obligation to provide (d).

Where there has been a considerable lapse of time since the occurrence of an act the due performance of which is questioned, *e.g.*, where the capacity of the party is impeached, the law will uphold the act in the absence of strong and cogent evidence to the contrary (e). On the same principle, it is presumed that a person who has prepared or attested the deed of an alleged lunatic would, if he had been alive at the time of the action, have sworn that the alleged lunatic was of sound mind at the date of the execution of the deed (f).

The Court of Appeal laid down in *Banks v. Goodfellow* (g) the important rule that the whole burden of showing that the testator was competent at the time of the making of the will lies on the party claiming under the will.

(a) 1 Bl. Com. 302.
(b) See also Chapter I. on Definition and Classification of Insanity.
(c) *Re Blair, a Lunatic*, 1 My. & Cr. 300.
(d) *Re Evans*, 21 Ch. D. 297 C.A.
(e) *Towart v. Sellers*, 5 Dow. 231.
(f) *Towart v. Sellers*, Supra.
(g) Supra.

Evidence of the alleged lunatic's conduct at the time when the question of the state of his mind is raised is material and very important, and evidence of his conduct both before and after the date of the event which gave rise to the legal proceedings is relevant (a), although it would seem that evidence of his conduct at the time carries much more weight than evidence of his conduct before and after the event (b).

In a civil action where an act is alleged to be the act of a lunatic, the facts that the act itself, as well as the manner of doing it, is rational are strong presumptive evidence of the sanity of the doer at the time of the act. Thus, where the validity of a lease of a farm held by a man was questioned on the ground of his having a delusion that he and the farm were impregnated by sulphur, evidence of his ability to transact ordinary business was admitted by the Court of Appeal as evidence of his sanity in *Jenkins v. Morris* (c) where Jessel, M.R., said (d) "it must be recollected that, although a man may believe a farm to be impregnated with sulphur and not fit for himself to live in, he may still be a shrewd man of business, and may even believe that the other party may not know of the impregnation of the farm with the sulphur and that in consequence he may get a higher price for it than if it was known that it was so impregnated."

Evidence of this kind is admissible even when the subject of the inquiry is under confinement as a lunatic. Thus, where an inmate of a lunatic asylum made a will in a rational manner, evidence was admitted to show that the act was done in a lucid interval (e).

(a) *Beavan v. M'Donnell*, 10 Exch. 184.
(b) *Ferguson v. Borrett*, 1 F. & F. 613.
(c) 14 Ch. D. 674.
(d) Ibid. p. 683.
(e) *Cartwright v. Cartwright*, 1 Phillim. 90.

In all cases such as the foregoing due consideration must be had to the spontaneity of the act, to its accord with natural affection and with moral duty, and to its conformity to past and to subsequent declarations of intention (a).

Where, however, the chief or only evidence of insanity is to be derived from the nature of the act in question, such act must necessarily bear strong internal indications of irrationality in order to afford any presumption of the insanity of the doer (b).

The value of the evidence of the alleged lunatic's conduct before and after the event which gives rise to the action naturally varies materially in accordance with the nature of the mental infirmity from which he is actually suffering or from which he is alleged to be suffering. When the question of a man's sanity is raised, the Court attaches more importance to the *general* habits and manner of life of the alleged lunatic than to any *particular* acts performed by him, however strange they may appear to be in themselves; for, as Dr. Mercier says, "while it is untrue to say that everyone is insane on one point or to some extent, it is very nearly true to say that everyone is insane *at some time* in his life" (c).

Thus, where a man took an unduly harsh view of the conduct of his children and disinherited them and left his property to strangers, it was held that these acts may be the result of eccentricity or caprice and quite consistent with general sanity (d).

The writings of an alleged lunatic are admissible in evidence on the issue whether he be sane or not (e), and in *Cartwright v. Cartwright* (f) it was held that

(a) *White v. Driver*, 1 Phillim. 84.
(b) *Boughton v. Knight*, L.R. 3 P. & M. 64.
(c) Sanity and Insanity p. 131.
(d) *Boughton v. Knight.* Supra.
(e) *Bootle v. Blundell*, 19 Ves. 494.
(f) 1 Phillim. 90.

the handwriting of an alleged lunatic may be of some value as evidence for or against his sanity.

Evidence may be given also to show that blood relatives of the alleged lunatic are suffering or have suffered from insanity. This proposition holds good certainly in criminal cases where it is sought to prove that the accused was insane when he committed the offence (a). It is probable that such evidence would be admissible also in a civil action (b).

Evidence that an alleged lunatic is treated by his friends or by his relatives in such a manner as would serve to indicate that he is regarded by them as being "strange," or of such abnormal temperament that he requires to be "humoured" with respect to particular subjects, is admissible on the question of his sanity only as between the said friends or relatives and the alleged lunatic, but not as against third parties (c). Where it is sought to introduce evidence of what the alleged lunatic himself did respecting such treatment, evidence thereof is admissible, but not otherwise: thus, where letters were written to the alleged lunatic, evidence was admitted to show that they were read or acted upon by the alleged lunatic (d).

In *Greenslade v. Dare* (e) it was decided that general reputation among the inhabitants of the district in which the alleged lunatic lives is not admissible in evidence, whether to prove the fact of sanity or to fix some person with notice of it. Moreover, the evidence of the alleged lunatic himself is insufficient either to establish his incapacity or his sanity (f).

With regard to the evidence of medical experts in cases of alleged lunacy, the general principle is that the opinions of such medical practitioners as have

(a) *R. v. Oxford*, 9 C. & P. 525.
(b) *M'Adam v. Walker*, 1 Dow. 148.
(c) *Re Windham*, 31 L.J. (Ch.) 721, C.A.
(d) *Wright v. Doe d. Tatham*, 1 Ad. & El. 3 (Ex. Ch.)
(e) 20 Beav. 284.
(f) *Knight v. Young*, 2 Ves. & B. 184; *Bootle v. Blundell.* Supra.

made a special study of mental diseases *and* have examined the alleged lunatic are admissible in evidence on the question whether he is of unsound mind (a). The Court refuses, however, to admit as evidence for or against the existence of insanity of a particular person the opinion of a medical practitioner as to the existence of facts which he himself has not perceived (b).

The Lunacy Act, 1890, allows a medical practitioner to certify as insane upon two sets of data; that is to say:—(i.) facts observed by himself at the time of examination of the alleged lunatic and (ii.) facts communicated by others. Thus, although hearsay evidence such as (ii.) is excluded by the English rules of evidence, a medical practitioner is entitled by Statute to make use of, and in practice makes considerable use of, statements tending to prove the insanity of the alleged lunatic which were communicated to him by persons who could not be called as witnesses in an action for false imprisonment brought by a person who had been improperly detained in an asylum under such a certificate.

It is a well-accepted principle of the law of evidence that the question whether the opinions of the medical witness have been formed on sufficient grounds is for the jury, or for the Court in Chancery cases, to decide (c). In the case of *In re Dyce v. Sombre* (d) the Lord Chancellor said that the most satisfactory proof of the recovery from an unsound state of mind is the conviction of the non-reality of the delusions which arose from the disease (*i.e.*, the corrigibility of the delusion). Lord Cottenham made this statement with the object of showing that, in spite of the opinions expressed by expert medical witnesses, the Court must be satisfied from its know-

(a) *Martin v. Johnston*, 1 F. & F. 122; *Lovatt v. Tribe*, 3 F. & F. 9.
(b) 1 Ph. 520; Taylor, 1421; Steph. Art. 49.
(c) *Lovatt v. Tribe*, Supra. *Martin v. Johnston*, Supra.
(d) 1 Mac. & G. 116.

ledge of the circumstances of the case that the person is or is not insane. This view of the Lord Chanceller is quite in accordance with modern scientific opinion. An eminent authority on lunacy, Sir Frederick Mott, K.B.E., M.D., Director of the Pathological Laboratory, Maudsley Hospital, London, says that conduct is the only satisfactory test of insanity, and Dr. Mercier says that " the real test of insanity is the corrigibility of the defect " (a).

Dr. Mercier says that it is only by conduct that the state of a man's mind can be known. " It is impossible," he says, " for mind alone to be disordered ; for feelings and thoughts, mental states and mental processes, are but the shadows or accompaniments of nervous states and nervous processes ; and since no mental change can occur save as the shadow or accompaniment of a nervous change, so, *a fortiori*, no mental disorder can occur except as the shadow or accompaniment of a nervous disorder. . . . When the highest nervous processes are disordered not only must mind be disordered, but conduct also must be disordered. Hence, mental disorder cannot exist alone, but must always be accompanied by disorder of nervous processes and by disorder of conduct." (b).

The finding of a jury on an inquisition of lunacy is not conclusive evidence of the fact of insanity, still less is it evidence of the period when the insanity commenced (c), and the presumption in favour of insanity which is thus created may be rebutted (d).

The fact that a person who seeks to rebut the finding attended the execution of the commission would seem to be immaterial (e).

There seems to be some doubt whether the finding of a jury at a coroner's inquest is admissible as evidence

(a) Sanity and Insanity p. 125.
(b) Sanity and Insanity p. 103.
(c) *Re Walden, Ex parte Bradbury*, 3 Jur. 1108.
(d) *Clement v. Rhodes*, 3 Add. 37 ; *Rodd v. Lewis*, 2 Lee. 176.
(e) *Re Nesbitt, an alleged lunatic*, 2 Ph. 245.

of the fact of insanity in civil proceedings, but it is submitted that, inasmuch as the constitution of the body holding the inquisition is similar to that of a jury on an inquisition of lunacy, probably such evidence would be admissible (a).

In *Harvey, v. R.* (b) it was held that the Order of a Master in Lunacy made under Section 116 of the Lunacy Act, 1890, reciting that a person is, in the opinion of the Master, of unsound mind, is admissible, *prima facie*, as evidence of the fact of his insanity; it seems, however, that the official report of a Chancery visitor is not so admissible. Thus, where in *Roe v. Nix* (c) an action to obtain probate of the will of a lunatic so found by inquisition, two of the next of kin opposed probate on the ground of the insanity of the testatrix at the date of the will, the Chairman of the Board of Chancery Visitors was examined on behalf of the defendants, and admitted that the reports which had been made by himself and by his colleagues were still in existence, but refused to produce them, on the ground that he was precluded by Section 186 of the Lunacy Act, 1890, from making them public. It was held that the reports must be treated as non-existence and that no order should be made for their production.

It has been held, however, that the finding of a jury on an inquisition of lunacy is admissible as evidence in civil proceedings (d).

Where such a finding is one of insanity, it creates a presumption in favour of that fact and throws the *onus* of proof upon those who contend the contrary (e).

According to Sir Matthew Hale, a lunatic who had performed any act, whether lawful (*e.g.*, a contract),

(a) *Hall v. Warren*, 9 Ves. 605; *Jones v. White*, 1 Str. 68.
(b) (1901) A.C. 601.
(c) (1893) P. 55.
(d) *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *Dane v. Kirkwall*, 8. C. & P. 679.
(e) *Snook v. Watts*, 11. Beav. 105.

or unlawful (*e.g* , a tort), and was known and proved to have *lucida intervalla* was presumed to have performed the act in one of those intervals. As to what amounts to a lucid interval, reference should be made to Chapter II on "Definition and Classification."

It is true that the legal test of lunacy differs from the medical and that the tests of capacity and of irresponsibility on the ground of insanity as adopted by the English Courts of Law—notably in M'Naughten's case (a)—have never been acquiesced in by the medical profession as a whole. With a view to determining, therefore, whether and to what extent these different views are reconcilable, it is necessary in the first place to ascertain at what point the lines of divergence are to be observed. The two views are set out below :—

As to legal tests. The modern tendency is to consider the question of capacity or responsibility with strict reference to the *character of the act* which has to be or has been done.

As to medical tests. There should not be a fixed test of responsibility by which every case is to be decided, inasmuch as there are infinite varieties in the forms and degrees of mental derangement, and the question of responsibility depends upon an impartial weighing of every one of the factors in each case. Mere knowledge of the nature and quality of an act, and that it is a wrongful act, is not of itself sufficient to establish the moral (and, as a consequence, the legal) responsibility of the actor. The element of self-control enters as well as the element of understanding, and *the right*

(a) 10 Cl. & Fin. 200. The substance of the replies of the judges to the questions put to them by the House of Lords in this case was to the following effect :—"To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong."

question for consideration is the disabling effect of the particular mental disorder in the particular circumstances.

The point of divergence of the two views stated above would seem to be at this "element of self-control," and reference should be made to the several forms of insanity as distinguished by medical nomenclature which are set out in Chapter II. (a). There are, however, two types of insanity concerning the characteristics of which there has been much controversy, *viz.*, "*moral insanity*" and "*impulsive insanity*," and herein will probably be found to lie the chief difference of opinion in the method to be adopted for determining the responsibility of the insane for their acts.

It will be shown below that it is in this very element of self-control, as applied to the acts of the insane, that the test of responsibility should be sought. It is necessary in the first place, however, to bear in mind what the medical authorities have to say respecting these less clearly defined phases of insanity termed "*moral insanity*" and "*impulsive insanity.*" The modern medical view (b) may be summarised as follows:—Concerning "*moral insanity*" it may be observed that in most of the common forms of insanity, *i.e.*, those coming generally under the heads of *dementia* and *mania*, alteration of the character and disposition is followed before long by derangement of the mind as expressed in conduct and, as a rule, of bodily health as well. But there are cases in which neither physical nor mental capacity appears to be affected, and yet the moral sense is perverted to such a degree that the person is held to be insane. Whether or not such perversion should be called "*moral insanity*" or "*moral depravity*" must in most cases be dubious, inasmuch as the one passes

(a) Definition and Classification.
(b) See also Chapter on Definition and Classification.

insensibly into the other without any dividing line, and the difference between them appears to be one only of degree. This is one of the grounds upon which the legal and medical tests of responsibility come into conflict.

"*Impulsive Insanity*" is the name given to a morbid condition of the mind, in which strong or ungovernable impulse to perform some irrational act is developed, without delusion or loss of general self-control. It is not the same thing as a sudden outburst of passion which partakes more of the nature of temporary mania culminating in an explosive act: in other words, it is the result of general loss of control. A person suffering from "impulsive insanity" may consciously resist the impulse and keep it in check for an indefinite time. He may eventually conquer it, or it may at last conquer him, in which event the result is that he obeys its dictates with a perfectly clear vision of the probable consequences.

These two cases are considered separately. In the description given of "*moral insanity*," no allowance is made for the fact that although it may be difficult to determine, even by the medical expert, at what precise moment the borderline between "*moral insanity*" and "*moral depravity*" has been crossed, before the Court can pass judgment in any individual case of alleged insanity the law has to decide whether this precise moment has or has not arrived. Moreover, so far as the law is concerned, this "dividing-line" is not the matter in issue; the question is in fact one of capacity or incapacity. It is manifest that in cases where neither physical nor mental capacity appears to be affected and yet the moral sense is perverted, the law must require some evidence, apart from either common consent or the dubious surmises of expert medical testimony, to prove conclusively that the person is insane.

Furthermore, while it is true that both the negligent

and the morally *depraved* person (as distinguished from the morally *defective*), while not insane, may be seized with an ungovernable impulse to do some irrational act without delusion or loss of general self-control, there is no disposition either by the Courts or by the medical profession to credit either of these persons with irresponsibility, and, consequently, to excuse them from liability for their acts. It will be observed that when dealing above with impulsive insanity (where consideration was given to the possibility of a man's consciously resisting an insane impulse temporarily and of his eventually allowing it to overcome him), there is nothing to indicate that the communications between mind and brain have become so disturbed by disease as to make the lunatic no longer accountable for his actions.

From the foregoing considerations, it is concluded that responsibility ceases where the actor is no longer able to understand the nature and consequences of his act, or where he is no longer under such self-control as enables him to be capable of exercising the power of choice. The test, therefore, which should be applied where irresponsibility through mental disease is alleged, is the existence or non-existence of the power of control: the question to be answered is—does the actor possess such control of his reasoning faculties as enables him to understand what is the nature and what will be the probable consequences of his act? That is to say—Is his mind under such control that he is capable of determining his course of action according to the rules of rational life? Inasmuch as responsibility is a consequence of the ability of the mind to act freely, it follows that where delusion has occupied the seat of reason, where the will is merely the creature of suggestion, and where capacity to control is removed, a state of irresponsibility has set in.

While it is true that difficulties of any degree may

have to be faced in determining whether a given act was voluntary or not, it must be borne in mind that insanity is essentially a question of fact, and that the burden of proof is upon the party who alleges in a Court of Law the existence of abnormal conditions. This does not mean that it is necessary that theories of psychology, normal or abnormal, should be made propositions of law. The errors of common sense are more tolerable, upon the whole, than those of speculation: at all events, they may be corrected more easily.

APPENDIX (I.)

SUMMARY OF CHIEF POWERS AND DUTIES OF LUNACY AND MENTAL DEFICIENCY AUTHORITIES IN ENGLAND.

1. The Board of Control (lately the Commissioners in Lunacy).
2. The Minister of Health.
3. The Secretary of State for Home Affairs.
4. The County or County Borough Council.
5. The Asylums and Mental Deficiency Committee of the County or County Borough Council.
6. The Metropolitan Asylums Board.
7. Poor Law Guardians.
8. The Lord Chancellor.
9. The Judge in Lunacy (Lord Justice of Appeal).
10. The Masters in Lunacy.
11. Police Court Magistrates.
12. Justices of the Peace.
13. Judge of County Court.
14. Chancery Visitors.
15. The Board of Education.
16. The Local Education Authority.

1. *The Board of Control*, as now constituted, is composed of not more than fifteen Commissioners, and, of these, twelve are to receive remuneration. Four of the number must be practising barristers, or solicitors, of five years' standing, whilst at least two of the Board must be women, one of whom must be a paid Commissioner.

The chief duties of the Board of Control are the general supervision of the administration of the Lunacy Acts, 1890-1911 and of the Mental Deficiency Act, 1913, and the inspection of the places or institutions in which persons subject to be dealt with under these Acts are detained.

The Board is empowered, with the approval of the Lord Chancellor, to prescribe by Rules the books to be kept in institutions for lunatics and houses for single patients; the entries to be made therein; the returns, reports, notices, etc. to be sent to the Board or to any authority or person, and the persons by whom, the times within which, and the manner in which such returns, reports, notices etc. are to be made or sent. Such Rules must be laid before Parliament: they must be judicially noticed, and they have effect as if enacted by the Act.

2. *The Minister of Health* has certain duties relating to lunacy and mental deficiency administration, the chief of which are:—

(*a*) *Under the Lunacy Acts.*

(i) The approval of agreements to unite for lunacy purposes entered into by two or more local authorities.

(ii) The approval of contracts between two or more local authorities or between the proprietors of licensed houses and local authorities for the housing of pauper lunatics.

(iii) The approval of contracts for the purchase of land, and for the provision of mental hospitals by lunacy authorities: also the approval of plans of asylum buildings, and of additions and alterations thereto.

(iv) By Section 14 of the Lunacy Act, 1891, any questions relating to lunatic asylums or to the maintenance of lunatics arising between any

local authorities under the Lunacy Act, 1890, and any boroughs not being local authorities under that Act, and any visiting Committees or any two or more of such parties respectively, may be referred to an arbitrator appointed by the parties, or, if the parties cannot agree upon an arbitrator, by the Minister of Health.

(*b*) *Under the Mental Deficiency Act*, 1913.

(v) If the Board of Control report to the Minister of Health that a local authority have made default in the performance of any of their duties under this Act, the Minister of Health may . . . upon being satisfied that such default has taken place, by order require the local authority to do such acts for remedying the default as he may direct.

(vi) The Minister of Health may, by order, direct that joint action shall be taken by any two or more local authorities for the purpose of the exercise and performance of their duties under this Act (Section 29).

(vii) Under Section 37 (1) of the Mental Deficiency Act, 1913, on the application of the local authority for any area comprising the whole or any part of a poor law union, the Board of Control may, subject to the consent of the Minister of Health, if satisfied of the special fitness for the detention, care and training of defectives of any premises provided by the Board of Guardians, approve the premises for the reception of defectives. The Board of Guardians, in their capacity as managers, may, subject to the consent of the Minister of Health, contract with local authorities for the reception of defectives into such premises.

3. *The Secretary of State for Home Affairs* retains the following duties under the Lunacy Acts and under the Mental Deficiency Act, 1913 :—

(i) The issue of warrants for the admission into County or Borough Asylums of lunatics dealt with under the Criminal Lunatics Act, 1884.

(ii) The control and management of criminal lunatic asylums.

(iii) The Secretary of State may direct that a defective who is undergoing imprisonment shall be removed to an institution or placed under guardianship (Mental Deficiency Act, 1913, Section 9.)

4. *The County Council or County Borough Council.* The Lunacy Act, 1890, places upon the County Council or the County Borough Council as the case may be, the duty of providing adequate accommodation for (i) the lunatics notified by the Poor Law Guardians, and (ii) other lunatics for whom the County is responsible. If the Board of Control report to the Minister of Health that the Council has failed to satisfy the requirements of the Act as regards asylum accommodation, the Minister of Health may require the Council to provide accommodation in such manner as he may direct, and may proceed by *mandamus*, if necessary, to enforce the requisition.

Under the Mental Deficiency Act, 1913, similar duties so far as regards accommodation, supervision, and guardianship are placed upon these bodies in respect of those persons within the County or Borough area who have been ascertained to be subject to be dealt with under the Act, with the additional duty of ascertaining what defective persons are subject to be dealt with under the Act. (See also " The Asylums and Mental Deficiency Committee ").

5. *The Asylums Committee or the Asylums and Mental Deficiency Committee* is a Committee appointed by the County Council or County Borough Council under the provisions of the Lunacy Act, 1890, and of the Mental Deficiency Act, 1913, through whom the local authority performs its statutory duties in regard to (i) the insane and (ii) mentally defective persons for whom it is responsible; that is to say,

(i) The control and management of the County or Borough lunatic asylums or mental hospitals (a), and the housing and treatment, by contracts with other authorities, of lunatics for whom there is no accommodation available in the County or Borough asylums or mental hospitals.

(ii) The ascertainment of what persons within the local area are defectives subject to be dealt with under the Mental Deficiency Act, 1913.

(iii) The provision of suitable supervision, institution accommodation, or guardianship for defectives in accordance with the provisions of the Mental Deficiency Act, 1913.

Upon this Committee also is laid the important duty of discharging pauper lunatics from the asylums or mental hospitals (b).

As regards lunatics the County Council or County Borough Council (which acts through its Statutory Committee) is responsible to find accommodation for those patients only who are duly certified to be fit and proper persons for treatment in a public asylum or mental hospital. With very few exceptions all the lunatics referred to are dealt with, in the first instance, by the Poor Law Guardians, who apply to the

(a) The county of London and certain other county authorities have adopted the term "mental hospital" in lieu of the term "asylum."

(b) Patients admitted to the public asylums and mental hospitals as "paupers" may, upon arrangement made by their friends or relatives with the Committee, be classified as "private patients."

Statutory Committee for accommodation in a County asylum or mental hospital. In the County of London application for accommodation is made in suitable cases (*i.e.*, where the lunatic is chronic and harmless) to the Metropolitan Asylums Board who have provided a certain amount of accommodation for such lunatics as can be detained in a workhouse.

6. *The Metropolitan Asylums Board* (which is constituted by representatives of every Board of Guardians in the County of London) was empowered by the Metropolitan Poor Act, 1867, to provide asylums for the accommodation of such harmless pauper lunatics as could, under the Lunacy Acts, be allowed to remain in a workhouse. There are at present four asylums where feeble-minded pauper persons such as idiots, imbeciles, and harmless chronic lunatics are detained. The cost of the maintainance of these feeble-minded persons is borne by the Guardians of the Parish to which the pauper belongs. Under the existing administration of lunacy law, a large number of patients who ought normally to be accommodated in the institutions of the Metropolitan Asylums Board are housed in the London County Mental Hospitals at a cost of maintenance considerably higher than would be the case if they were properly classified and accommodated in the institutions of the Metropolitan Asylums Board.

In accordance with strict legal nomenclature, the institutions of the Metropolitan Asylums Board in which lunatics are accommodated are not "asylums" but are merely "workhouses" established under the Poor Laws (a).

7. *Poor Law Guardians.* It is the duty of the Poor Law Guardians to notify the local authority (*i.e.*, the County Council or County Borough Council)

(a) This fact accounts to a large extent for the confusion which exists in the mind of the public between the Asylums and Mental Deficiency Committee of the London County Council and the Metropolitan Asylums Board.

of such persons as may be temporarily or permanently chargeable to the rates who have been certified in accordance with the Lunacy Acts to be lunatics for whom accommodation in a public asylum or mental hospital is necessary.

Over ninety-eight per cent. of the patients in the public asylums or mental hospitals are admitted thereto upon the application of the Poor Law Guardians.

In suitable cases the Guardians of the London Poor Law Parishes and Unions make application for the admission of harmless lunatics to the institutions of the Metropolitan Asylums Board.

8. *The Lord Chancellor.*

(i) Where the Commissioners of the Board of Control have visited a lunatic detained in a private, family, or charitable establishment, they may report to the Lord Chancellor who may thereupon make an order for the discharge or removal of the lunatic (a).

(ii) Where any person is detained as a lunatic and the Board of Control represent to the Lord Chancellor that it is desirable that the extent of the lunatic's property should be ascertained, the Lord Chancellor may, through the Masters in Lunacy, direct that a statement of the particulars of the lunatic's property and of its application shall be transmitted to him (b).

(iii) The Lord Chancellor may, upon the recommendation of the Justices of a County or Quarter Sessions, revoke or prohibit the renewal of a licence granted in respect of any house for the reception of lunatics (c).

(a) Lunacy Act, 1890, Section 206.
(b) Ibid, Section 50.
(c) Ibid, Section 221.

(iv) The Lord Chancellor may, by an order in writing under his hand, require the person or persons to whom the order is directed, to visit and to examine a lunatic or alleged lunatic (whether so found or not) and to inspect any place in which he is detained, and to report thereupon to him (a).

9. *The Judge in Lunacy.* The jurisdiction of the Judge in Lunacy is exercised either by the Lord Chancellor for the time being entrusted under the royal sign manual with the care and commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of the Lords Justices of appeal similarly entrusted for the time being, or by any one or more of such judges so entrusted (b).

In practice, the Lord Chancellor, acting under statutory powers in that behalf, requests each of the Lords Justices to act as an additional judge of the Chancery Division of the High Court of Justice for the purpose of making lunacy orders. For several years it has been the custom for lunacy orders to be made by one of the Lords Justices (*i.e.*, the Judge in Lunacy) sitting in Chambers, and for matters to be referred by the lunacy officials to the Lords Justices in rotation.

The powers of the Judge in Lunacy relate chiefly to the administration and management of the estates of lunatics and to the appointment of persons as committees of the persons of lunatics.

10. *The Masters in Lunacy.* The Masters in Lunacy must be barristers of at least ten years' standing. They are appointed by the Lord Chancellor to exercise such of the powers of the "Judge in Lunacy" as are conferred upon them by the Lunacy Acts and by the Rules in Lunacy.

(a) Lunacy Act, 1890, Section 205.
(b) Ibid, Section 108.

They possess wide powers and duties relating to the persons and property of lunatics. They are *ex-officio* visitors, jointly with the Chancery visitors, of lunatics so found by inquisition. Their chief duty is to ascertain whether an alleged lunatic is of unsound mind in the following cases :—

(i) Where the alleged lunatic does not demand a jury :

(ii) Where the judge in lunacy considers it unnecessary or inexpedient that the inquisition should be before a jury.

11. *Police Court or Stipendiary Magistrate.* A Police Court or Stipendiary Magistrate may exercise the powers of the judicial authority in regard to the hearing of petitions for the making of reception orders for the detention of lunatics.

He may also make orders under Section 4 of the Mental Deficiency Act, 1913, for persons subject to be dealt with under that Act to be detained in an institution for defectives or to be placed under guardianship.

12. *Justices of the Peace.*—Certain Justices of the Peace are specially appointed annually under the Lunacy Acts to act as certifying justices in respect of alleged lunatics.

Under the Lunacy Acts their duties are to call to their assistance one or two (as the legal technicalities of the case may require) "duly qualified medical practitioner or practitioners," and, if satisfied that the alleged lunatic is insane, to certify that he is a fit and proper person to be detained in a lunatic asylum. Under the Mental Deficiency Act, 1913, such Justices have similar powers to those conferred upon them by the Lunacy Acts. They may make orders under Section 4 of the Mental Deficiency Act for persons subject to be dealt with under that Act to

be detained in an institution for defectives or to be placed under guardianship.

13. *Judge of County Court.* A judge of a County Court may exercise the powers of the judicial authority in regard to the hearing of petitions for the making of orders for the detention of lunatics under the provisions of the Lunacy Acts.

Under Section 13 of the Lunacy Act, 1890, he has power to deal in certain specified circumstances with the property of a lunatic where the value is under £200.

He may also make orders, under Section 4 of the Mental Deficiency Act, 1913, for persons subject to be dealt with under that Act to be detained in an institution for defectives or to be placed under guardianship.

14. *Chancery Visitors.* The Chancery Visitors are medical and legal visitors of lunatics so found by inquisition. They are appointed by the Lord Chancellor. The Chancery Visitors are *ex-officio* visitors of lunatics so found by inquisition jointly with the Masters in Lunacy. Their duties are to visit lunatics so found by inquisition, at such times, and in such rotation and manner, and to make such enquiries and investigations as to their care and treatment and mental and bodily health and the arrangements for their maintenance and comfort, as the Rules in Lunacy, or as any special order of the Judge in Lunacy in any particular case, shall from time to time direct. Every such lunatic must be visited personally and seen by one of the Chancery Visitors twice at least in every year.

The powers of visitation conferred upon the Chancery Visitors in no way relieves the statutory committee of visitors of public asylums from their duty of visiting in accordance with the requirements of Section 188 of the Lunacy Act, 1890.

15. *The Board of Education.* The Board of Education is required to frame regulations for the guidance of the Local Education Authorities in the performance of their duties under the Mental Deficiency Act, 1913, the chief of which are as follows :—

(i) The ascertainment of what children within their area are defective within the meaning of the Act, and who are incapable, by reason of mental defect, of profiting by instruction in special schools ; and

(ii) The notification to the local authority under the Act of all children who fall within certain specified classes as defined by Section 2 (2) of the Act. (See also " Local Education Authority."

16. *The Local Education Authority.* The chief duties of the Local Education Authority under the Mental Deficiency Act, 1913, are to make arrangements, subject to the approval of the Board of Education :—

(i) For ascertaining what children within their area are defective children within the meaning of the Act.

(ii) For ascertaining which of such children are incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes.

(iii) For notifying to the Mental Deficiency Committee what defective children are imbeciles or feebleminded persons within the meaning of Section 1 (b) and (c) of the Act.

APPENDIX (II.)

SUGGESTIONS FOR THE REFORM OF LUNACY AND MENTAL DEFICIENCY ADMINISTRATION.

Since the Lunacy Acts of 1890 and 1891 came into operation there has been a degree of inefficiency and a lack of uniformity in lunacy administration throughout the country, due in great measure to the fact that the duty of dealing with the insane poor has been placed jointly upon the local Poor Law authority and upon the County or County Borough Council acting through a statutory committee which is, to a large extent, independent of the body by whom it is appointed.

In view of the terms of the recommendations of the recently published reports of the Commissions on the Administration of the Poor Law, and on the Care and Control of the Feeble-minded, and in view also of the establishment of a permanent Ministry of Health, the following suggestions are made for the improvement of lunacy administration :—

(1). The abolition of the law of settlement of paupers so far as regards those certified to be of unsound mind.

Large sums of public money are expended annually by Poor Law and county authorities in determining the "chargeability" of pauper lunatics. It is submitted that the maintenance of all lunatics and feebleminded persons should be made a national charge.

(2). The care and treatment of all persons of unsound mind by the Central Authority referred to below.

(3). The abolition of the Statutory Committee of the County or County Borough Council set up by the Lunacy Act, 1890, and the transference of all its powers and duties to the Central Authority referred to below.

In view of the nature of lunacy and of mental deficiency, the need for treatment on broad lines, and the wide powers for segregation of the mentally unfit conferred on local authorities by the Mental Deficiency Act, 1913, it would appear to be in the national interest that the duty of dealing directly with the ascertained cases of mental defectives and of dealing indirectly with the thousands of "borderline" cases should be placed upon a Central Authority directly responsible to Parliament. It is only by a policy of co-ordination that economy and efficiency in the public administration of lunacy and of feeble-mindedness can be effected.

(4). For the foregoing reasons, it is suggested that the Board of Control be made a sub-department of the new Ministry of Health, and that the Board be given statutory powers to deal with all cases of unsoundness of mind (*i.e.*, lunatics and mental defectives) in such manner as may be prescribed by Parliament: that is to say, the Board shall be enabled to certify, to segregate, to treat in or outside of institutions, all persons who by reason of defect of mind are a danger or a potential danger to themselves or to the community, and to discharge them in proper circumstances. In other words, it is proposed to confer on the Central Authority wide powers for dealing not only with certified lunatics, idiots, imbeciles and feeble-minded persons, but also with all persons who may be suffering from mental disorder in an incipient stage.

INDEX

PRINTED IN GREAT BRITAIN AT THE DEVONSHIRE PRESS, TORQUAY.